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Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

MATTHEW HARRELL,

*Petitioner,*

v.

CITY AND COUNTY OF HONOLULU,
A Municipal corporation, AARON MAHI, Sr. Director,
ROBERT LARM, and SANFORD MASADA,

*Respondents.*

**On Petition For A Writ of Certiorari To The Court Of Appeal Of The State Of California**

## PETITION FOR A WRIT OF CERTIORARI

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## A. THE QUESTIONS PRESENTED FOR REVIEW

1. Is it legally possible for a musician, who retired from the U.S. Army band (And various duty stations around the world) after 20 years as a bassoonist and top Sargent, and who was even rated qualified for the bassoon position by the interview panel for the Honolulu City municipal band job he applied for, to be denied an opportunity to hold the position, even after the other 2 (of the 3) "qualified" applicants turned down the job, and not be discriminated against illegally because he is black in a City where there have been no black musicians in the Honolulu City municipal band for 120 of it's 170 years, apparently since King Kamehameha, III hired 2 African-American musicians to create and lead his Royal Hawaiian band in 1834, whose name the City of Honolulu has appropriated?

2. Did the Ninth Circuit Appellate court majority err in holding The District court did not err in denying Plaintiff-Petitioner's Motion For New Trial, because there was no competent evidence that Plaintiff-Petitioner was not substantially qualified to perform the duties of a regular bassoonist in the Honolulu City Municipal, band which has not had an African-American member in over 125 of it's 170 history?

3. Was the admitted collusion of the rating panel which rated the black Plaintiff-Petitioner lower in experience in music, despite his 20 years of professional Army band work, and other orchestra work, in favor of giving a non-black applicant who

served under the Petitioner in the Army band and who only had 5-8 years of professional bassoon work in the Army and Hawaii National Guard band, clear evidence of discrimination, especially in light of the rating panel's prevarications and subsequent attempts disparaging Petitioner's qualifications, even while each panel member rated Petitioner "qualified" under all stated criteria and then some, and therefore justification for awarding a new trial?

4. Didn't the Ninth Circuit Appellate Court and The District court err, in denying Petitioner's Motion For New Trial, because the Appellate court failed improperly to recognize the District Court erred in granting The Order Granting in Part and Denying in Part the City Defendant's Motion In Limine NO. 4, "TO EXCLUDE ALL TESTIMONY AND EVIDENCE CONCERNING ALLEGED HISTORICAL DISCRIMINATION BY DEFENDANT ROYAL HAWAIIAN BAND WHICH PREDATE THE INDIVIDUAL DEFENDANT'S PARTICIPATION AS ADMINISTRATORS IN THE ROYAL HAWAIIAN BAND" entered September 21, 2004. Docket No. 105.RA. T.P 1-5-06 P. 2-14, L. 7-21. P2-21 L 21-25.

Those facts go to the City's maintenance of an illegal discriminatory policy, and practice, for which the City of Honolulu is liable under Monel.

5. Based upon the totality of the facts and circumstances, isn't it clear that Plaintiff-Petitioner did not receive a fair trial in this case, because in this civil rights case, 1) there were no African-American

jurors in the entire jury pool and petite panel, and 2) the court allowed the City to improperly restrict the presentation of evidence of the City's entire history of racial discrimination in City municipal band employment. 3) where Petitioner was experienced and rated qualified by an expert and the City's own interview panel and 4) where the witnesses and documents of Plaintiff's musical experience and official Military musical training and Educational documents created in the ordinary course of business, of which the court should take judicial notice under Rule 201, and are Relevant under 401 and 402, and under Rules 803(5)(6)(8)(16)&(18) and as Self-Authenticating documents under 901(7)&(8) and 902(5)&(6), were nevertheless denied?

6. Do not the admitted evidence of collusion in the rigging of the job interview panel results, unfair impediments learning the music such as being denied copies of the scores given to all but the black applicant, and rational inconsistencies seeking to justify denial of opportunity to the nevertheless rated qualified black applicant, in a City with a long history of employment discrimination based upon color, not the mention the exclusion and absence of any African-Americans in the entire jury pool, justify the grant of a new trial in this case?

## B. THE PARTIES TO THE PROCEEDING

The Plaintiff-Appellant. Matthew Harrell, a 20 year U.S. Army band bassoon player veteran, who is African-American, sued the City of Honolulu Municipal corporation due to the persistent pattern of racial discrimination in refusing to hire African-American musicians for the Royal Hawaiian Band for over 100 years, which practice illegally deprived Plaintiff of his right to equal employment and promotional opportunity in violation of 42 U.S.C. 1981A, 42 U.S.C. 2000e and 42 U.S.C. 1985, when he applied for a vacant bassoon player position with the City and County of Honolulu in the fall of the year 2000, when he retired from the U.S. Army band, after 20 years of active bassoon musical experience. Trial. Transcript 1-5-06 P. 2-25-2-27.

Defendant, AARON MAHI, was the Conductor of the Defendant ROYAL HAWAIIAN Band, who Plaintiff-Appellant argued, knowingly engaged in illegal discrimination against Plaintiff in a contrived and biased application process culminating with Plaintiff's non-selection, based on a non-job performance matters, and demonstrated a pattern of color and racial discrimination in hiring, in violation of 42 U.S.C. 2000e, Sec. 704(a), Title VII and the Hawaii State Civil Rights Act, Sec. 378 of the Hawaii Revised Statutes. (H.R.S.). Docket No. 1. Complaint.

DEFENDANT, Sanford Masada, was the group leader of the Lower brass Section of the Hawaii National Guard band. Therefore he should have recused himself due to the conflict of interest posed by Chris Ventura, another Hawaii National Guard Band

member's application for the vacant bassoonist position, sought by Plaintiff Harrell. Mr. Masada nevertheless remained on the section committee for this position with the Royal Hawaiian Band, and participated knowingly in illegal rigging of the job application audition and interview process, culminating with Plaintiff's wrongful non-selection for a bassoon player position with the band, based on a discriminatory manipulation of the job selection process in violation of 42 U.S.C. 2000e, Sec. 704(a). Title VII and the Hawaii State Civil Rights Act, H.R.S. Sec. 378.

DEFENDANT, ROBERT LARM, is the assistant Director of The Royal Hawaiian Band, who knowingly engaged in illegal discrimination against Plaintiff in a contrived and biased manipulation of the job application, audition and interview process, culminating with Plaintiff's wrongful non-selection for a bassoon player position with the band,, based on discriminatory non-job performance matters in violation of 42 U.S.C. 2000e, Sec. 704(a), Title VII and the Hawaii State Civil Rights Act, H.R.S. Sec. 378.

## TABLE OF CONTENTS


Page

A. THE QUESTIONS PRESENTED FOR REVIEW ..... 1

B. THE PARTIES TO THE PROCEEDING .... iv

C. STATEMENT OF THE BASIS OF SUPREME COURT JURISDICTION ..... 1

D. STATEMENT OF THE CONSTITUTIONAL PROVISIONS, STATUTES, TREATIES AND OR REGULATIONS INVOLVED IN THE CASE ..... 2

E. THE CONCISE STATEMENT OF THE CASE ..... 2

F. DIRECT, CONCISE ARGUMENT ..... 7

CONCLUSION ..... 32

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

ADAMS v. AMERITECH SVCS., 231 F.3d 414 (7th Cir. 2000) ..... 22

Alexander v. Louisiana, 405 U.S. 625, 631, 92 S.Ct. 1221, 1225, 31 L.Ed.2d 536 (1972) ..... 18

Arlington Heights, 429 U.S. at 267, 97 S.Ct. at 564 ..... 17, 20

Avery v. Georgia, 345 U.S. 559, 562 (1953) ..... 30

Ballard v. United States 329 U.S. 187, 195 (1946) . 28

BATSON v. KENTUCKY, 476 U.S. 79 (1986) ..... 27

Bazemore v. Friday, 478 U.S. 385 (1986) ..... 21

Bonilla v. Oakland Scavenger Co. 697 F 2d 1297 (1982) ..... 32

Burdine, 450 U.S. 248, 253 (1981) ..... 15

Carter v. Jury Comm'n of Greene County 396 U.S. 320, 330 (1970) ..... 27

Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 874, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984) ..... 8, 22

TABLE OF AUTHORITIES – Continued

Page

Davis v. Califano
613 F.2d 957, 965 (D.C.Cir. 1979) ..... 18

DAVIS v. NEW YORK CITY HOUSING AUTH.
99 6238 (2nd Cir. 2002); 875 F.2d 365, 371 (2d Cir.
1989), cert. denied, 493 U.S. 1021 (1990) ..... 22

FOSS v. THOMPSON
242 F.3d 1131 (9th Cir. 2001) ..... 22

Franks v. Bowman Transp. Co.
424 U.S. 747, 772, 96 S.Ct
1251, 47 L.Ed.2d 444 (1976) ..... 8

GAY v. WAITERS' AND DAIRY
LUNCHMEN'S UNION
694 F.2d 531 (9th Cir. 1982) ..... 17

Griggs vs. Duke Power Co.
401 US supra @ 426, 91 S Ct
at 851, 28 L Ed 2d @ 161 ..... 35

Harris v. Forklift Systems, Inc.
510 U. S. 17, 21 ..... 12

Hazelwood School Dist. v. United
States 433 U.S. at 309, n. 15, 97
S.Ct. at 2742 n. 15 ..... 17, 18, 23

HEMMINGS v. TIDYMAN'S INC.
285 F.3d 1174 (9th Cir. 2002) ..... 22

TABLE OF AUTHORITIES – Continued

Page

Hernandez v. Texas
347 U.S. 475, 478-479 (1954) ..... 29

International Bhd. of Teamsters v.
United States, 431 U.S. 324, 326 (1977)) ..... 22

LYONS v. ENGLAND
307 F 3d 1092 (9th Cir. 2002) ..... 13, 14, 15, 16, 17

McCray v. New York
461 U.S. 961, 968 (1983) ..... 28, 30

MORGAN v. NATIONAL R.R. PASSENGER,
300 F.3d 1144 (9th Cir. 2002) ..... 11

NATIONAL RAILROAD PASSENGER
CORPORATION v. MORGAN
536 U.S. 101 (2002) ..... 11

OBREY v. JOHNSON
400 F.3d 691 (9th Cir. 2005) ..... 7, 9, 10

O'Brien v. Sky Chefs, Inc
670 F.2d at 867. ..... 18

PAIGE v. CALIFORNIA
291 F.3d 1141 (9th Cir. 2002); ..... 21, 22

Powers v. Alabama Dept. of Educ.
854 F.2d 1285, 1293 (11th Cir. 1988) ..... 21

TABLE OF AUTHORITIES – Continued

Page

Rowe vs. General Motors Corp.
457 F 2d 345 @ 355 ..... 35

SHOPPE v. GUCCI AMERICA, INC.,
94 Haw. 368 (2000) ..... 22

St. Mary's Honor Ctr. v. Hicks
509 U.S. 502, 511 (1993) ..... 14, 15

Smith v. Union Oil Co. of California,
17 Fair Empl. Prac. Cas. 960, 991
(N.D.Cal. 1977) ..... 18

STOUT v. POTTER
276 F.3d 1118 (9th Cir. 2002) ..... 22

Texas Dep't of Cmty. Affairs v. Burdine
450 U.S. 248, 253 (1981)) ..... 14, 15

Wallis vs. Simplott
26 F.3d at 889 ..... 16

Teamsters v. United States
431 U.S. 324, 360. ..... 8, 19, 21

Washington v. Davis
426 U.S. 229, 241-242. ..... 20

WEINSTOCK v. COLUMBIA UNIVERSITY
224 F.3d 33 (2nd Cir. 2000) ..... 22

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES:

Title VII, Civil Rights Act of 1974, § 701 et seq. as amended 42 U.S.C.A. 2000e et seq. ..... 33

FEDERAL RULES:

Federal Rules of Evidence, Rule 201 ..... iii, 11
Federal Rules of Evidence, Rule 401 ..... iii, 11
Federal Rules of Evidence, Rule 402 ..... iii, 11
Federal Rules of Evidence, Rule 803(5) (6)(8)(16)&(18) 901(7)&(8) ..... iii, 11
Federal Rules of Evidence, Rule 902(5)&(6) ... iii, 11

## C. STATEMENT OF THE BASIS OF SUPREME COURT JURISDICTION

Plaintiff invokes the jurisdiction of this Court pursuant to the common law and 42 U.S.C. 1981.; 42 U.S.C. 1983; 42 U.S.C. 1985, 42 U.S.C. 1986 and 42 U.S.C. Section 20OOd.; and 42 U.S.C. §§ 1983, U.S.C. Section 1343(3).

Plaintiff also invokes this Court's pendent jurisdiction. This is an action also authorized and instituted pursuant to the Civil Rights Acts of 1866, 1868 and 1872 and Title VI of the Civil Rights Act of 1964, 1968, 1972, as amended by 42 U.S.C. 1981A. The unlawful public park use restriction practices alleged in this complaint were committed in the City and County of Honolulu, State of Hawaii. In addition, the amount in controversy is substantially in excess of $75.000.00 pursuant to 28 U.S.C. 1331 and 28 U.S.C. Section 1332(a)(1).

The jurisdiction of the court is invoked to secure the protection of Civil Rights and to redress deprivation of rights, privileges, and immunities secured by a) 14th Amendment to the Constitution of the United States, Section 1(b) the Commerce Clause. Article 1, Section 8, Clause 3 of the Constitution of the United States; c) Title 2 of the Civil Rights Act of 1964, 78 STAT 243, 42 U.S.C. Section 2000(a) at seq. Providing for injunctive relief against discrimination and places of public accommodation; and d) 42 U.S.C. 1981, providing for the equal rights of citizens and all persons within the jurisdiction of the United States, matters over which the Federal courts have original jurisdiction.

This is an appeal of a final Order Denying Plaintiff-Appellant's Motion For Judgment As A Matter of Law or In the Alternative For New Trial, and Order Denying Plaintiff-Appellant's Motion for Mistrial filed April 24, 2006, Docket Nos. 166 and 167 (Record on Appeal Document A, RA Page 3-13; 42-55) Plaintiff-Appellant filed his Notice of Appeal on May 24, 2006. Docket No. 168.

On July 20, 2008 the Ninth Circuit Court of Appeals filed an Order affirming the jury verdict after denying Plaintiff-Petitioners' Motions for Mistrial and For A New Trial a hearing affirming the February 15, 2007 the District judge entered an order Granting Defendant's Motion for Judgment on the Pleadings Or, In The Alternative For Summary Judgment. Appendix No. 1.

This Petition for Writ of Certiorari is timely filed pursuant to Rules 10, 11, 12, 13, 14, 33. 34 and 38 of the United States Supreme Court Rules.

## D. STATEMENT OF THE CONSTITUTIONAL PROVISIONS, STATUTES, TREATIES AND OR REGULATIONS INVOLVED IN THE CASE

This case involves violation of 42 U.S.C. 1981A, 42 U.S.C. 2000e, 42 U.S.C. 1983, 42 U.S.C. 1985, 42 U.S.C. 1986 and violation of 42 U.S.C. 2000e, Sec. 704(a), Title VII and the Hawaii State Civil Rights Act, Sec. 378 of the Hawaii Revised Statutes,(H.R.S.).

## E. THE CONCISE STATEMENT OF THE CASE

The Plaintiff-Appellant, Matthew Harrell, a 20

year U.S. Army band bassoon player veteran, who is African-American, sued the City of Honolulu Municipal corporation due to the persistent pattern of racial discrimination in refusing to hire African-American musicians for the Royal Hawaiian Band for over 100 years, which practice illegally deprived Plaintiff of his right to equal employment and promotional practice illegally deprived Plaintiff of his right to equal employment and promotional opportunity in violation of 42 U.S.C. 1981A, 42 U.S.C. 2000e and 42 U.S.C. 1985, when he applied for a vacant bassoon player position with the City and County of Honolulu in the fall of the year 2000, when he retired from the U.S. Army band, after 20 years of bassoon musical experience. Trial. Transcript 1-5-06 P. 2-25-2-27.

Defendant, AARON MAHI, was the Conductor of the Defendant ROYAL HAWAIIAN Band, who Plaintiff-Appellant argued, knowingly engaged in illegal discrimination against Plaintiff in a contrived and biased application process culminating with Plaintiff's non-selection, based on a non-job performance matters, and demonstrated a pattern of color and racial discrimination in hiring, in violation of 42 U.S.C. 2000e, Sec. 704(a), Title VII and the Hawaii State Civil Rights Act, Sec. 378 of the Hawaii Revised Statutes, (H.R.S.). Docket No. 1. Complaint.

DEFENDANT, Sanford Masada, was the group leader of the Lower brass Section of the Hawaii National Guard band. Therefore he should have recused himself due to the conflict of interest posed by Chris Ventura, another Hawaii
National Guard Band member's application for the

vacant bassoonist position. sought by Plaintiff Harrell. Mr. Masada nevertheless remained on the section committee for this position with the Royal Hawaiian Band. and participated knowingly in illegal rigging of the job application audition and interview process. culminating with Plaintiff's wrongful non-selection for a bassoon player position with the band, based on a discriminatory manipulation of the job selection process in violation of 42 U.S.C. 2000e. Sec. 704(a). Title VII and the Hawaii State Civil Rights Act. H.R.S. Sec. 378.

DEFENDANT, ROBERT LARM, is the assistant Director of The Royal Hawaiian Band, who knowingly engaged in illegal discrimination against Plaintiff in a contrived and biased manipulation of the job application, audition and interview process. culminating with Plaintiff's wrongful non-selection for a bassoon player position with the band,. based on discriminatory non-job performance matters in violation of 42 U.S.C. 2000e, Sec. 704(a), Title VII and the Hawaii State Civil Rights Act. H.R.S. Sec. 378.

The defendant, ROYAL HAWAIIAN BAND, is a Division of the City and County of Honolulu, is an "employer" within the meaning of Section 378 of the Hawaii Revised Statutes and section 701(b) of Title VII, and engages in receiving Federal Funds and Contracts under Title VI. and has employed more than the requisite number of persons for the requisite duration under Title VII.

Plaintiff was hired by the Royal Hawaiian Band to play part-time occasionally in 1997, having served for 20 years as a bassoon player for the Army Band. Plaintiff was called to play numerous times by the

administrators of the band: but was never allowed to take the sheet music home to practice. as some other job applicants were allowed to do. T.P. Jan. 6. 2006 P. 3-64 1-23.

Plaintiff applied for of a permanent job opening for a bassoonist with the Royal Hawaiian Band, and in August 2000, he applied along with several other bassoon players. 3 auditioned.

The experience, availability, competence and talent of Plaintiff were not fairly graded by Defendants. constituting illegal racial discrimination in public employment by these Defendants against Plaintiff Harrell.

Even after the other 2 applicants turned down the bassoon position, the City refused to offer the position to the Plaintiff, a black musician with 21 years experience playing the bassoon in the U.S. Army band. He was highly recommended by the prior bassoon player with the Royal Hawaiian band as his replacement when he stepped down. to concentrate on his job as lead bassoonist with the Honolulu Symphony.

Given the pool of available talented musicians of African-American extraction, and the Royal Hawaiian Bands' own history of employment of African-American-Hawaiian musicians as Leaders of the King's Royal Band, as far in the past as the 1830's, 1840's and 1850's of the inception of the band by King Kamehameha III, the exclusion of black and brown musicians from the band is notable at the present time. A situation which has persisted for a generation or more.

After Plaintiff filed his EEOC complaint of his

non-selection. the Royal Hawaiian Band administration wrote to Plaintiff and inquired of Plaintiff if he was still interested in playing with the Royal Band upon occasions when he was available and they needed a Bassoon player. and Plaintiff wrote and responded affirmatively. However. he was never called to play ever again.

The jury's verdict in favor of the Defendants rendered on January 12. 2006, Docket No. 157. was arrived at improperly through limiting of the evidence Plaintiff intended to present, by the court's prior, but improper and prejudicial granting of several of the Defendant City & County of Honolulu's Motions in Limine at or after the hearing on Motions In Limine held on August 31, 2004, which preventing Plaintiff from presenting much relevant historical and musical evidence to the jury. These improper and unfair rulings entered September 21, 2004, improperly prejudiced Plaintiff's case.

Also, when Plaintiff's counsel saw that there were no African-American people at all in the entire jury pool. he lodged and objection and filed a Motion For a Mistrial.

Particularly Motions in Limine 4 and 8, were wrongfully granted to the improper prejudice of Petitioner, with regard to Prof. Miles Jackson and Kathryn Takara. authors of books on History in the islands, knowledgeable of newspaper records mentioning the history of African American musicians in Hawaii and the Royal Hawaiian band at it's inception in 1834 and down through the years. That evidence of the bands history down through the years is yearly relevant to it's pattern of discrimination

under National Railroad and OBREY v. JOHNSON. 400 F.3d 691 (9th Cir. 2005) and the book excerpts should have been admitted and Dr. Jackson and Dr. Takara's testimony allowed for it's historical and statistical value. Docket No. 144. Docket No. 94.

The evidence of discrimination presented during the trial, precludes the jury's conclusion, the Plaintiff was not discriminated against with regard to his application for the bassoon position. And such conclusion was arrived at improperly, by the court's refusal to allow Plaintiff to present relevant facts of the City's history and pattern and practice of discrimination regarding band jobs.

The absence of any African-Americans in the entire jury panel, after first being informed the jury panel would be pre-selected prior to the trial by the court staff, which Plaintiff objected to, denied the African-American Plaintiff a fair trial in this case, as cited in Plaintiff's Motions for New Trial and For Mistrial. RA 42. Transcript of Proceedings Jan., 4. 2006. RA 27-29.

## F. DIRECT, CONCISE ARGUMENT

The Trial court erred in abusing it's discretion to limit the history of discrimination in Honolulu City Band employment.

As the Ninth Circuit recently ruled in OBREY v. JOHNSON, 400 F.3d 691 (9th Cir. 2005) the Defendant City of Honolulu Municipal bands own employment rosters and records are relevant admissible evidence, which was improperly refused from admission into evidence in this case.

As the plaintiff, Obrey bore the initial burden of making out a prima facie case of discrimination. Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 874, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984). And, because he alleged a system wide pattern or practice of resistance to the full enjoyment of Title VII rights, Obrey ultimately had to prove "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." Teamsters, 431 U.S. at 336, 97 S.Ct. 1843.

**He had to establish, by a preponderance of the evidence, that racial discrimination was the Navy's "standard operating procedure — the regular rather than the unusual practice." Id. By "demonstrating the existence of a discriminatory pattern or practice," Obrey would "establish[] a presumption that [he] had been discriminated against on account of race."** Cooper, 467 U.S. at 875, 104 S.Ct. 2794 (citing Franks v. Bowman Transp. Co., 424 U.S. 747, 772, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976)).

In a case in which the plaintiff has alleged that his employer has engaged in a "pattern or practice" of discrimination, "[s]tatistical data is relevant because it can be used to establish a general discriminatory pattern in an employer's

> hiring or promotion practices. Such a discriminatory pattern is probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue." Diaz v. Am. Tel. & Tel., 752 F.2d 1356, 1363 (9th Cir. 1985):[fn1] see also McDonnell Douglas, 411 U.S. at 805 n. 19, 93 S.Ct. 1817 ." OBREY v. JOHNSON, 400 F.3d 691 (9th Cir. 2005)

THE PLAINTIFF, MATTHEW HARRELL, filed a proper and relevant opposition to the Defendant's Motion In Limine No. 8, and the court's order, which precluded the Plaintiff from eliciting testimony from Prof. Miles Jackson and Dr. Kathryn Takara, for the purpose on introducing to the jury Learned Treatise evidence concerning the creation of the Royal Hawaiian Band, with significant African-American musician and Director Involvement in the 1830's and 1840's. August 2, 2004. Docket No. 78, on Sept. 10, 2004 . Docket No. 94. On January 3, 2006 Plaintiff filed a Memorandum in Opposition to City Defendant's Motion in Limine #4 to exclude Plaintiff's exhibits filed by Matthew Harrell. Docket No. 139. OBREY v. JOHNSON, 400 F.3d 691 (9th Cir. 2005)

These documents Exhibits 73 and 86, The Honolulu Magazine Article on the History of the Royal Hawaiian Band, and Prof. Miles Jackson's book on African-Americans in Hawaii, AND THEY CAME, which it' chapter on the History of the Royal Hawaiian band have been listed on Plaintiff's witness list for at least 2 years. Including both Pre-Trial Statements

and exhibit lists. Dr. Takara and Dr. Jackson were know to be witnesses at least by August 26, 2002, when we delivered an updated witness list to Deputy Corporation Counsel Anthony Aguinaldo. And the trial was not until four years later. OBREY v. JOHNSON, 400 F.3d 691 (9th Cir. 2005) .

For a period of more than a Century or more, there has been no African-American membership in the Royal Hawaiian, the City band up until the present time. While the previous hundred years does pre-date the present administration of the band, the history of the band's employment practices are relevant to the issue of discrimination in this case.

Furthermore, the policies of the Defendant, City and County of Honolulu with regard to this 100 year old fact, is also at issue here. There are black City employees in most other departments. These employee defendants may only in fact only carrying out the 100 year old City policy and practice of black musician exclusion started during the term of prior administrators of the City band.

The individual Defendants are not the only Defendants. The City and County of Honolulu, is a defendant and charged with maintaining a 100 year old unwritten policy and practice of exclusion of qualified African-American musicians from membership in the Royal Hawaiian Band. Credible written reports document the fact that In the 1830's King Kamehameha III's Royal Hawaiian Band was lead by America Shattuck and David Curtis, his assistant. In 1845 it was lead by George W. Wyatt and Charles Johnson, according to documents city by retired U. H. Librarian Dr. Miles Jackson, Ph.D., in

his new book "AND THEY CAME", and a 1986 HONOLULU MAGAZINE ARTICLE. Exhibits "A" and "B".

These facts are so well known within the community therefore, they are of the type of which the court can take judicial notice under Rule 201, and is Relevant under 401 and 402, and are exceptions to the Hearsay rule under Rules 803(5)(6)(8)(16)&(18) and as Self-Authenticating documents under 901(7)&(8) and 902(5)&(6). Docket Nos. 78, 94, 95.

The U.S. Supreme Court rejected the Defendant's argument clearly in NATIONAL RAILROAD PASSENGER CORPORATION v. MORGAN, 536 U.S. 101 (2002) & MORGAN v. NATIONAL R.R. PASSENGER, 300 F.3d 1144 (9th Cir. 2002)

> "an employee who initially files a grievance with that agency must file the charge with the EEOC within 300 days of the employment practice..."
>
> The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed. Nor does the statute bar an employee from using the prior acts as background evidence to support a timely claim. In addition, the time period for filing a charge remains subject to application of equitable doctrines such as waiver, estoppel, and tolling. See *Zipes* v. *Trans World Airlines,*

*Inc.*, 455 U. S. 385, 393.

(c) Hostile work environment claims are different in kind from discrete acts. Because their very nature involves repeated conduct, the "unlawful employment practice," §§2000e-5(e)(1), cannot be said to occur on any particular day.

It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. See *Harris* v. *Forklift Systems, Inc.*, 510 U. S. 17, 21. Determining whether an actionable hostile environment claim exists requires an examination of all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Id.*, at 23. That act need not be the last act. Subsequent events may still be part of the one claim, and a charge may be filed at a later date and still encompass the whole. Therefore, a court's task is to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and if so, whether any act falls within the statutory time period. To support his hostile environment claim,

Morgan presented evidence that managers made racial jokes, performed racially derogatory acts, and used various racial epithets. Although many of these acts occurred outside the 300-day filing period, it cannot be said that they are not part of the same actionable hostile environment claim. Pp. 12-18.

In Morgan, the Supreme Court held that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges," 122 S.Ct. at 2072, while "a hostile work environment claim . . . will not be time barred so long as all acts which constitute the claim are part of the same unlawful ≤employment≥ practice and at least one act falls within the time period,"[fn6] id. at 2077. Abner J. Morgan, Jr., brought claims of disparate treatment, retaliation, and hostile work environment ≤racial≥ ≤harassment≥ against Amtrak, alleging inter alia that he was repeatedly denied training opportunities, subjected to unwarranted disciplinary action, and unlawfully discharged. LYONS v. ENGLAND, 307 F 3d 1092 (9th Cir. 2002)

**Appellants claimed in their EEOC charges that NADNI had "intentionally engaged in the systematic elimination of Black Males from the GS-13 and GS-14 levels of management" by denying**

qualified candidates selection for promotion and favorable details..... The district court's conclusion to the contrary is in error. LYONS v. ENGLAND. 307 F 3d 1092 (9th Cir. 2002)

*

We begin instead with the Court's statement in Evans that untimely evidence of the employer's discriminatory acts "may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." 431 U.S. at 558 (emphasis added). "Relevant evidence" is defined by Rule 401 of the Federal Rules of Evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. In the context of a racial disparate treatment claim, admissible background evidence must be relevant to determine "the ultimate question: whether . . . `the defendant intentionally discriminated against [the plaintiff]' because of his race." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (quoting Texas Dep't of Cmtv. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

The district court will sometimes be required to engage in Rule 403 balancing when determining the admissibility of evidence of time-barred acts, Fed.R.Evid.

403 (stating that otherwise relevant evidence may be excluded if its probative value is substantially outweighed by its potential for unfair prejudice or confusion of the issues), **bearing in mind that, in discrimination cases, probative evidence of wrongful intent will necessarily prejudice the defendant's case.**[fn13] LYONS v. ENGLAND, 307 F 3d 1092 (9th Cir. 2002)

At the initial stage of a case of disparate treatment, appropriate background evidence will be evidence, either direct or circumstantial, that, when combined with evidence of the employer's present conduct, "give[s] rise to an inference of unlawful discrimination." Burdine, 450 U.S. at 253.

For even if this were not a "hostile work environment" case, the history of harassment and discriminatory treatment of Plaintiff is admissible as context information. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (quoting Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

____In such a circumstance, a plaintiff may satisfy the second prong of McDonnell Douglas by providing circumstantial evidence of his qualification for the position. For the

purpose of establishing a prima facie case, the plaintiff is not restricted to providing the bare minimum of evidence required by the McDonnell Douglas test, but may rely also on other circumstantial evidence that tends to raise an inference of discrimination. See Wallis, 26 F.3d at 889 ("In offering a prima facie case, of course, a plaintiff may present evidence going far beyond the minimum requirements."); see also McDonnell Douglas, 411 U.S. at 802 n. 13 (stating that "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from [the plaintiff] is not necessarily applicable in every respect to differing factual situations"); Cordova, 124 F.3d at 1148 (stating that the McDonnell Douglas test provides "[o]ne way" to raise an inference of discrimination). LYONS v. ENGLAND, 00-55343 (9th Cir. 2002) Filed October 9, 2002. (Emphasis added)

## CONCLUSION

Following the Supreme Court's recent decision in National Railroad Passenger Corp. v. Morgan, 122 S.Ct. 2061 (2002), we affirm the district court's ruling that appellants' claims of disparate treatment arising out of detail assignments made prior to May of 1996 are time-barred. However, we reverse the court's summary judgment on appellants' timely failure-to-promote

discrimination claims.

> We remand for trial on Lyons' and Tate's promotion claims, arising out of events occurring in 1996, and on all appellants' promotion claims arising out of the 1997 events. Appellants' evidence of discriminatory detail assignments occurring outside the limitations period cannot be used to sustain an independent cause of action for discrete acts of disparate treatment based on time-barred events, **but appellants may offer it as relevant evidence of the employer's intent to discriminate both within the limitations period and following the filing of appellants' EEOC charges**. We affirm the district court's summary judgment on Tate's retaliation claim. The court should award costs to the appellants. LYONS v. ENGLAND, 307 F 3d 1092 (9th Cir. 2002)

Clearly, there are simply a long line of cases going back a lot of years, which hold that historical evidence of discrimination, and statistical evidence of the actual hiring record of the Defendant over a number of years is a recognized and accepted method of proving discrimination, through relevant circumstantial evidence. For instance in

> GAY v. WAITERS' AND DAIRY LUNCHMEN'S UNION, 694 F.2d 531 (9th Cir. 1982) *See Hazelwood School Dist. v. United States, supra*, 433 U.S. at 309, n. 15, 97 S.Ct. at 2742 n. 15; *Arlington Heights, supra*, 429 U.S. at 267, 97 S.Ct. at 564.

> Indeed, we have recently started that "subjective decisions-making strengthens an inference of discrimination from general statistical data . . . ." *O'Brien v. Sky Chefs, Inc., supra*, 670 F.2d at 867. *See also Davis v. Califano*, 613 F.2d 957, 965 (D.C.Cir. 1979).
>
> The district court stated that the hotels' "subjective" practices "may have tended to exclude blacks." 489 F. Supp. at 300. We agree that such subjective practices may provide "ready mechanisms for discrimination," *Smith v. Union Oil Co. of California*, 17 Fair Empl. Prac. Cas. 960, 991 (N.D.Cal. 1977), because they may make it "easier for those who are of a mind to discriminate." *Alexander v. Louisiana*, 405 U.S. 625, 631, 92 S.Ct. 1221, 1225, 31 L.Ed.2d 536 (1972).

The leading case holding that historical evidence and statistical evidence is one method of proving discrimination in violation of Title VII is HAZELWOOD SCHOOL DISTRICT *v.* UNITED STATES, *433 U.S. 299* (1977) in which the U.S. Supreme Court.

> *Held:* The Court of Appeals erred in disregarding the statistical data in the record dealing with Hazelwood's hiring after it became subject to Title VII and the court should have remanded the case to the District Court for further findings as to the relevant labor market area and for an ultimate determination whether Hazelwood has engaged in a pattern or practice of employment discrimination since March 24, 1972.

the prima facie statistical proof in the record might at the trial court level be rebutted by statistics dealing with Hazelwood's post-Act hiring practices such as with respect Page 300 to the number of Negroes hired compared to the total number of Negro applicants. For. once a prima facie case has been established by statistical work-force disparities. the employer must be given an opportunity to show that "the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination," *Teamsters* v. *United States*, 431 U.S. 324, 360.

Drawing upon these historic facts, the Government mounted its "pattern or practice" attack in the District Court upon four different fronts. It adduced evidence of (1) a history of alleged racially discriminatory practices, (2) statistical disparities in hiring, (3) the standardless and largely subjective hiring procedures, and (4) specific instances of alleged discrimination against 55 unsuccessful Negro applicants for teaching jobs. Hazelwood offered virtually no additional evidence in response, relying instead on evidence introduced by the Government, perceived deficiencies in the Government's case, and its own officially promulgated policy "to hire all Page 304 teachers on the basis of training. preparation and recommendations. regardless of race, color or creed."

The proper comparison, in the appellate court's view, was one between Negro teachers in Hazelwood and Negro

teachers in the relevant labor market area.

In addition, the Court of Appeals reasoned that the trial court had erred in failing to measure the 55 instances in which Negro applicants were denied jobs against the four-part standard for establishing a prima facie case of individual discrimination set out in this Court's opinion in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802.[fn9]

We also noted that statistics can be an important source of proof in employment discrimination cases, since "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though §§ 703 (j) makes clear that Title VII imposes no requirement that a work force mirror the general population." *Id.*, at 340 n. 20.

See also *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266; *Washington* v. *Davis*, 426 U.S. 229, 241-242. Where gross statistical disparities can be shown, they alone may in a proper case constitute

prima facie proof Page 308 of a pattern or practice of discrimination. *Teamsters, supra*, at 339. Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship and Training Comm., 833 F.2d 1334. 1338 (9th Cir. 1987) (quoting Bazemore v. Friday, 478 U.S. 385 (1986)). [fn5] The "external pool" is defined by the categories of the 1990 California Census that correspond to the similarly skilled positions in the CHP. PAIGE v. STATE OF CALIFORNIA, 01-55312 (9th Cir. 2002)

Powers v. Alabama Dept. of Educ., 854 F.2d 1285, 1293 (11th Cir. 1988) ("[P]laintiffs alleging class-wide discrimination in promotions are not required to isolate the particular aspect of the promotional process that is responsible for the discriminatory impact."). PAIGE v. STATE OF CALIFORNIA, 01-55312 (9th Cir. 2002)

In this case, one of the supposedly "independent" raters has confessed during his deposition, he was at a meeting at which he was told all raters would give the 3 applicants the same grade on the "EXPERIENCE AND KNOWLEDGE", portion of the aural interview. So therefore, due to that order, that conspiracy, he could not say why he gave Chris Ventura a higher score for 8 years of military band experience. than he gave Plaintiff Matthew Harrell for 21 years of profession miliary band playing and supervising

experience. But what we are saying is that evidence. of this collusion, identifies an illegal and unfair practice and policy of the Royal Hawaiian Band. which results in the absence of hiring of qualified African-American musicians, and is therefore. illegal under Title VII. See Deposition Excerpt of Robert Larm.

Here are a few more cases, in addition to the recent 2002, Ninth Circuit Case of PAIGE v. STATE OF CALIFORNIA, 01-55312 (9th Cir. 2002) which hold that historical evidence of discrimination, is the relevant and necessary inquiry in an employment discrimination case, and therefore, Defendant's Motion in Limine No. 8, should be denied.

History Cases - The Relevance of City or company's history of Discriminatory hiring policy and practices was widely discussed and ruled relevant in the following cases: PAIGE v. CALIFORNIA, 291 F.3d 1141 (9th Cir. 2002): HEMMINGS v. TIDYMAN'S INC., 285 F.3d 1174 (9th Cir. 2002): DAVIS v. NEW YORK CITY HOUSING AUTH., 99-6238 (2nd Cir. 2002); 875 F.2d 365, 371 (2d Cir. 1989), cert. denied, 493 U.S. 1021 (1990)].; STOUT v. POTTER, 276 F.3d 1118 (9th Cir. 2002) FOSS v. THOMPSON, 242 F.3d 1131 (9th Cir. 2001); SHOPPE v. GUCCI AMERICA, INC., 94 Haw. 368 (2000); Cooper v. Federal Reserve Bank, 467 U.S. 867, 876 (1984) (citing International Bhd. of Teamsters v. United States, 431 U.S. 324, 326 (1977)).; WEINSTOCK v. COLUMBIA UNIVERSITY, 224 F.3d 33 (2nd Cir. 2000) ADAMS v. AMERITECH SVCS., 231 F.3d 414 (7th Cir. 2000); WEINSTOCK v. COLUMBIA UNIVERSITY, 224 F.3d 33 (2nd Cir.

2000)

The historical evidence of African-American conductors being hiring by King Kamehameha III to actually start the band is relevant to the issue of the existence of the "job pool" of qualified African-American musicians in Hawaii. Because it establishes beyond a doubt black musicians have been in the islands for almost 2 Centuries and were many times accorded due respect and work. But not by the City for over a hundred years. That is just too long. Hence, the Defendant's motion in Limine No. 4 should be denied, to allow all of the relevant historical evidence or the local job pool, and City Royal Hawaiian Band hiring practices, procedures, methods, conspiracy and policies to be brought forth at trial, pursuant to the rule of ; Hazelwood Sch. Dist., 433 U.S. at 307-08; and the other cases cited above.

These documents Plaintiff's Exhibits 73 and 86, The Honolulu Magazine Article on the History of the Royal Hawaiian Band, and an excerpt from Prof. Miles Jackson's book on African-Americans in Hawaii, AND THEY CAME, which it' chapter on the History of the Royal Hawaiian band have been listed on Plaintiff's witness list for at least 2 years, as Exhibits 73 and 86. Were all delivered to the defendants previously (years previously since the trial was delayed for 3 years) and were Including both Pre-Trial Statements and exhibit lists.

Dr. Takara and Dr. Jackson were known to be witnesses at least by August 26, 2002, when we delivered an updated witness list to Deputy Corporation Counsel Anthony Aguinaldo. See Exhibit A. In the 1830's King Kamehameha III's

Royal Hawaiian Band was lead by America Shattuck and David Curtis, his assistant. In 1845 it was lead by George W. Wyatt and Charles Johnson. According to newspaper accounts of 1830's and 1840's the musicians were promised an acre of land by the King, a promise that was never kept. Former U. H. Library Director Dr. Miles Jackson, Ph.D., was prevented from telling the whole story revealed about the governments dealings with the African-American musicians who were the original leaders of the King's First Royal Hawaiian band, playing brass, wind and percussion instruments, they brought to the islands in the late 1700's and early 1800's many on whaling ships. Docket No. 78.

C. The Plaintiff's Motion for Mistrial filed April 24, 2006, and Plaintiff-Appellant's Motion for Judgment as a Matter of Law and Motion For New Trial was filed on March 10, 2004 should have been granted. Docket No. 162. Docket Nos. 167. For Plaintiff-Appellant was denied a fair trial for a variety of reasons under the circumstances.

Plaintiff's counsel must point out that January 1, 2006, he had to file a motion objecting to a "blind selection of the jury panel outside of the presence of the parties and counsel, which had been proposed by the court. We pointed out that traditionally in the 9th Circuit, during the 29 years that I have been trying jury cases, the seated panelists are selected at random from the pulling of their names from a sealed box. The randomness and anonymity of the selection process is a vast aid to the fairness and appearance of fairness of the process. Greater transparency in

these matters presents ambiguity and questions of fairness and preserves recognized traditional jury trial procedures designed to ensure protection of the 1st, 4th, 5th 6th, 8th and 14th Amendments. Docket No. 138. And while the court granted Plaintiff's objection, the jury panel of 50 or more people from which we had an opportunity to select our jury did not have any African-American citizens in it at all.

To which we filed a 2nd objection, and Motion for Mistrial, after an oral objection to the composition of the jury, without any African-American citizens in this employment discrimination case, dealing with the claims of individual discrimination against and a pattern and practice of employment discrimination against African-American musicians in Hawaii, once we actually were able to see the jury for the first time. Transcript of Proceedings January 4, 2006, Page, 1-8, L 14-25 - P. 1-9 L. 1-4. Written objection filed on Jan. 20, 2006. Docket No. 156.

The Plaintiff MATTHEW HARRELL submitted a Supplemental Memorandum renewing the original oral and written objection to the selection and composition of the panel culled for his trial, which had a total absence of African-American jurors in the pool, lodged by the Plaintiff at the commencement of the trial before the reception of any evidence.

As we previously stated, we noted and expressed our displeasure in the status conference before jury selection, noting that none of the people in the pool noted on their jury cards indicated that they were black people. After reviewing the jury card before the trial, we also noted that some cards were not marked in that area at all, and at least one was marked

"human". So. it seemed prudent to wait and see. because black people are human.

However, upon actually viewing the jury panel and engaging in voir dire, it did become clear that this panel was devoid of African-American even as potential jurors on Plaintiff's jury. Which contravenes and violates Mr. Harrell, the African-American Plaintiff's, Constitutional Right to have his case tried by a jury of his peers, which, of course includes African-Americans. The City's attorneys do not even have to bump a black juror from the final jury, if there are none included in the 50 person pool of available jurors.

It is not as though African-Americans do not, or have for a long time resided in Hawaii, Indeed the original members of the Royal Hawaiian Band started by King Kamehameha III in 1835 were black musicians. And at 3% of the Hawaii population and 6% of the Hawaii prison population is African-American, one would therefore expect 2 -3 African-Americans to be in the average jury pool of 100. Assuming the pool is drawn at random from the lists of licenced drivers and registered voters.

Plaintiff did not receive a fair shot at his Constitutional right to a trial by a jury of his peers with the selection or omission of a jury pool and trial jury devoid of black voters or drivers, denying him his right to a trial by a true jury of his peers. And as Constitutional rights have dimension and were written for a reason, Plaintiff must lodge his objection to the jury pool from which his panel of 8 reduced to 7 was selected.

In BATSON v. KENTUCKY, 476 U.S. 79 (1986) the U.S. Supreme Court ruled.

> Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. "The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine: that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." Strauder, supra, at 308; see Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 330 (1970).
>
> The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).[fn8] Those on the venire must be "indifferently chosen,"[fn9] to secure the defendant's right under the Fourteenth Amendment to "protection of life and liberty against race or color prejudice." Strauder, supra, at 309.
>
> the Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race

as a group are not qualified to serve as jurors.

By denying a person participation in jury service on account of his race, the State also unconstitutionally discriminates against the excluded juror. Moreover, selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.

The same equal protection principles as are applied to determine whether there is discrimination in selecting the venire also govern the State's use of peremptory challenges to strike individual jurors from the petit jury.

The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. See Ballard v. United States, 329 U.S. 187, 195 (1946); McCray v. New York, 461 U.S. 961, 968 (1983) (MARSHALL, J., dissenting from denial of certiorari).

Discrimination within the Page 88 judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which

the law aims to secure to all others." Strauder, 100 U.S., at 308.

We can be confident that no State now has such a law. The Constitution requires, however, that we look beyond the face of the statute defining juror qualifications and also consider challenged selection practices to afford "protection against action of the State through its administrative officers in effecting the prohibited discrimination." Norris v. Alabama, supra, at 589; see Hernandez v. Texas, 347 U.S. 475, 478-479 (1954); Ex parte Virginia, supra, at 346-347.

Thus, the Court has found a denial of equal protection where the procedures implementing a neutral statute operated to exclude persons from the venire on racial grounds,[fn10]

and has made clear that the Constitution prohibits all forms of purposeful racial discrimination in selection of jurors.[fn1

While decisions of this Court have been concerned largely with discrimination during selection of the venire, the principles announced there also forbid discrimination on account of race in selection of the petit jury. Since the Fourteenth Amendment protects an accused throughout the proceedings bringing him to justice, Hill v. Texas, 316

U.S. 400, 406
(1942), the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at "other stages in the selection process," Avery v. Georgia, 345 U.S. 559, 562 (1953); see McCray v. New York, supra, at 965, 968
The principles announced in Strauder never have been questioned in any subsequent decision of this Court.

Consequently, Plaintiff properly requested a mistrial, due to the violation of his 14th Amendment Rights to Equal Protection of the law, due to the exclusion of African-American jurors from the entire pool of his jury. Docket No. 156 160, 161.

Federal Civil Procedure Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue,

11.1 VIOLATIONS OF FEDERAL CIVIL RIGHTS—
ELEMENTS AND BURDEN OF PROOF

On the plaintiff's [describe claim] claim, the plaintiff has the burden of

proving each of the following elements by a preponderance of the evidence:

1. the acts or omissions of the defendant were intentional;

2. the defendant acted under color of law; and

3. the acts or omissions of the defendant were the cause of the deprivation of the plaintiff's rights protected by the Constitution or laws of the United States.

If you find that each of the elements on which the plaintiff has the burden of proof has been proved, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove any of these elements, your verdict should be for the defendant.

The Evidence presented at the trial has shown that black musicians were rated good enough to start the Royal Hawaiian Band by King Kamehameha III. when he created it back in the 1830's. Testimony of Miles Jackson.

Aaron Mahi never hired any black musicians or even any other Hawaiian musicians during the whole 22 years he ran the City of Honolulu Municipal band. His employment practices clearly show a "color bar",

and evidence of a classical colonial employment pattern of only people with light skin. No black musicians have even been employed by the City of Honolulu Royal Hawaiian band within the memory of anyone living. These despite an abundance of black musicians of every stripe in Hawaii for many many years.

We questioned Mr. Mahi about his "objective" and collaborative rating of Matt Harrell's and Christopher Ventura's "Knowledge and Experience." category. His conspiracy with Mr. Larm and Mr. Masada to award Chris Ventura the top score of 5 for 8 years of the same type of military band job that Matt had been doing for 20 years, and supervised Ventura in doing, as well as the other similar types of band playing experience they both had including UH and part-time with the Honolulu Symphony, was totally subjective #1 and clear evidence of irrational and discriminatory bias and an illegal conspiracy #2..

Mr. Harrell was rated at least Satisfactory and better on all rating sheets, proving that he was qualified for the job.

The Ninth Circuit Court of Appeals has ruled in Bonilla v. Oakland Scavenger Co. 697 F 2d 1297 (1982) that

> "Nepotistic concerns could not supersede mandate of employment discrimination laws...The company's practice of limiting share ownership to persons who were of Italian ancestry and were either members of family or close friends of current shareholders and practice of assigning

better jobs with higher pay and more guaranteed hours to shareholder employees was prim facie violation of Title VII, Civil Rights Act of 1974. S 701 et seq. as amended 42 U.S.C.A. 2000e et seq.

In this case, a racial bias and series of events of unfair treatment bias was proven. The Defendants admitted they conspired to grade Matt Harrell lower on certain important questions, such as experience and knowledge. When objectively, it is clear that his 21 years of professional experience are greater than the next highest candidates 8 years. Yet the committee AGREED to All give the local guy with less experience a higher grade than the black guy who actually has more years of professional player experience.

Sanford Masada did testify that he rated Mr. Harrell's performance as better than merely Satisfactory, according to the 70's and 50's he gave him. He also said that after he did that, Mr. Mahi made the final selection of the musician all by himself.

## CONCLUSION

The evidence shows that all of the Raters scored the Plaintiff as Good or better than Satisfactory.

Thus Aaron Mahi' rejection of this black candidate was based upon an arbitrarily and totally "Subjective evaluation", which at certain key objective points, reveals itself to be biased. Which explains in large part why there are no longer any black musicians in the City band, even though most would

concede that African-American musicians can play all types of music well. even Hawaiian music.

The Defendants clearly conspired to agree to rate Chris Ventura's 8 years of full time military band experience higher than Matt Harrell's 20 years of clearly superior experience shows a clear. The Defendants can't even argue they rated them even for similar primarily military experience. A semblance of fairness.

No. on a clear factual issue, which gives some measure of objective evaluation of a persons professional working career in music Aaron Mahi and his selected deputies and conspirators proved themselves to be totally subjective rather than objective, indicating a totally lack of realistic objectivity and their irrational and unreasonable bias against the more experienced Plaintiff. Clearly in terms of actual working years.

What we have in this case. which the Supreme Court in McDonnell Douglas Corp. vs. Green, supra @804 stated was "Especially relevant to proving `pre-textual' excuse for discriminatory action is "a showing that white [or as in this case non-black] employees involved in acts against petitioner of comparable seriousness to the "stall-in" were nevertheless retained or rehired."

Here both Chris Ventura and Ryan Howe, told the committee they would take the job if offered at the interview, but then declined the job. Then. they not Plaintiff are hired for part-time work thereafter. when Plaintiff is excluded.

Moreover, the very process of the audition was proven to be fundamentally unfair. The Defendants

refused to give Matt Harrell access to the sheet music to practice before the "Sight Reading" challenge, like they had given Chris Ventura. Ventura was not only allowed to take the music home, but was employed frequently to practice with the band before the audition. An opportunity denied the Plaintiff, who still played very well. So sure Ventura came out ahead, because he had access to the sheet music to practice and did so.

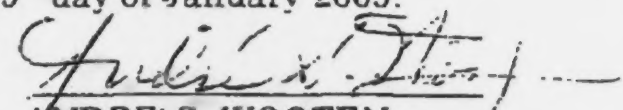
As the Supreme Court stated in Griggs vs. Duke Power Co. 401 US supra @ 426, 91 S Ct at 851, 28 L Ed 2d @ 161 and quoted in Rowe vs. General Motors Corp. 457 F 2d 345 @ 355: "It is clearly not enough under Title VII that the procedures utilized by employers are fair in form. These procedures must in fact be fair in operation. Likewise, the intent of employers who utilize such discriminatory procedures is not controlling since "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." Griggs vs. Duke Power Co. 401 US @ 432.

> "It is therefore clear that employment practices which operate to discriminate against people because of their race, color, religion, sex or national origin, violate Title VII, even though the practices are fair on their face and even though the employer had no subjective intention to discriminate."

Wherefore, Petitioner's respectfully prays that this court will reverse the Appellate court's ruling in this case and grant Petitioner a new and fair trial in

this case.

This 9th day of January 2009.

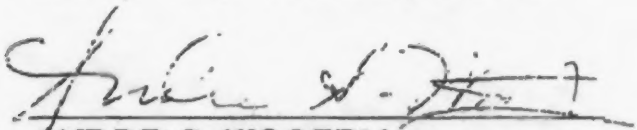


ANDRE' S. WOOTEN
Attorney For Plaintiff-Petitioner.
MATTHEW HARRELL

## 9. STATEMENT OF RELATED CASES

Plaintiff-Appellant. MATTHEW HARRELL is not aware of any related cases pending presently before the U. S Supreme Court pertaining to these issues.

This 9th day of January 9, 2009.



ANDRE' S. WOOTEN
Attorney For Plaintiff-Petitioner
MATTHEW HARRELL

**28-2.3 Attorneys Fees**

Plaintiff seeks attorney's fees in this Civil Rights Action pursuant to section 706(k) of Title VII, 42 U.S.C. §§ 2000e-5(k), the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. §§ 1988, and Ninth Circuit Rule 28-2.3.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

| | | |
|---|---|---|
| MATTHEW HARRELL,<br><br>Plaintiff,<br><br>vs.<br><br>CITY AND COUNTY OF HONOLULU, A Municipal Corporation, The Royal Hawaiian Band, Aaron Mahi, Sr. Director, Robert Larm, Sanford Masada,<br><br>Defendants. | ) | CIVIL NO. 01-00555 MEA-KSC<br><br>ORDER GRANTING IN PART AND DENYING IN PART CITY DEFENDANTS' FIRST AMENDED MOTION IN LIMINE NO. 4 |
| MATTHEW HARRELL,<br><br>Plaintiff,<br><br>CITY AND COUNTY OF HONOLULU, A Municipal Corporation, The Royal Hawaiian Band, Aaron Mahi, Sr. Director,<br><br>Defendants. | ) | CIVIL NO. 02-00223 MEA-KSC |

ORDER GRANTING IN PART AND
DENYING CITY DEFENDANTS' FIRST
AMENDED MOTION IN LIMINE NO. 4

Defendants City and County of Honolulu, A Municipal corporation, the Royal Hawaiian Band. Aaron Mahi, Sr. Director, Robert Larm and Sanford Masada's Motion in Limine No. 4, Excluding all Testimony and Evidence Concerning Alleged Discrimination by Defendant the Royal Hawaiian Band which Pre-date the Individual Defendants' Participation as Administrators in the Royal Hawaiian Band came on for hearing on August 9, 2004, before the Honorable Magistrate Judge Kevin S.C. Chang. Attorney André S. Wooten appearing for Plaintiff Matthew Harrell ("Plaintiff"). Deputy Corporation Counsels Derek T. Mayeshiro and Moana A. Yost appeared for Defendants City and County of Honolulu, the Royal Hawaiian Band, Aaron Mahi, Robert Larm and Sanford Masada (Collectively, "Defendants").

The Court having considered the written submissions and arguments of counsel, GRANTS IN PART AND DENIES IN PART Defendants' Motion in Limine No. 4 as follows:

(1) Plaintiff is precluded from introducing at trial and material contained in *Blacks in Old Hawaii*, an article written by R.A. Greer and published in the November 1986 edition of the Honolulu Magazine; and

(2) Subject to establishing the proper foundation, Plaintiff may offer historical

background information contained in the following passage at page 7 of And They Came: A Brief History and Annotated Bibliography of Blacks in Hawaii, written by Miles M. Jackson, Ph.D., which states:

> If they heard music serenading the villagers in the 1830's it would have been Kamehameha III's royal band under the direction of America Shattuk and his assistant, David Curtis. In 1845 George W. Wyatt and Charles Johnson were two Black leaders of the royal band and under their leadership the band expanded and improved its performance. R.A. Greer identified a few Blacks in Honolulu by name and claimed to have found many references to Blacks in various documentary sources for the period, 1810 through 1850.;
>
> The balance of the book entitled And They Came: A Brief History and Annotated Bibliography of Blacks in Hawaii is excluded.

Based on the foregoing, Defendants' First Amended Motion is Limine No. 4 is GRANTED IN PART AND DENIED IN PART, as stated on the record, herein.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii SEP 20 2004.

/s/ KEVIN S.C. CHANG
KEVIN S.C. CHANG
UNITED STATES MAGISTRATE
JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

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|---|---|
| MATTHEW HARRELL. | CIVIL NO. |
| | 01-00555 MEA-KSC |
| Plaintiff, | 02-00223 MEA-KSC |
| | [Cases Consolidated] |
| vs. | |
| | ORDER GRANTING |
| CITY AND COUNTY | DEFENDANTS' MOTION |
| OF HONOLULU, A | IN LIMINE NO.8 |
| Municipal Corporation. | RE: PRECLUSION OF |
| The Royal Hawaiian | PLAINTIFF'S EXPERT |
| Band, Aaron Mahi, Sr. | WITNESS'S TESTIMONY |
| Director, Robert Larm, | AND REPORT |
| Sanford Masada. | |
| | Hearing Date: August 9, |
| Defendants. | 2004 |
| | Time: 9:30 a.m. |
| MATTHEW HARRELL, | Judge: Magistrate Judge |
| | Kevin Chang |
| Plaintiff, | |
| | Trial Date: _____ |
| CITY AND COUNTY | |
| OF HONOLULU, A | Judge: Honorable Marvin |
| Municipal Corporation. | E. Aspen |
| The Royal Hawaiian | |
| Band. Aaron Mahi. Sr. | |
| Director, | |
| | |
| Defendants. | |

ORDER GRANTING DEFENDANTS' MOTION IN LIMINE NO. 8 RE: PRECLUSION OF PLAINTIFF'S EXPERT WITNESS'S TESTIMONY AND REPORT

Defendants' Motion in Limine No. 08 Re: Preclusion of Plaintiff's Expert Witness's Testimony and Report, came on for hearing at 9:30 a.m. on August 9, 2004, before the Honorable Magistrate Judge Kevin S. Chang; with André S. Wooten, Esq. appearing on behalf of Plaintiff, and Derek T. Mayeshiro, Esq. and Moana A. Yost, Esq., Deputies Corporation Counsel, appearing on behalf of Defendants City and County of Honolulu, the Royal Hawaiian Band, Aaron Mahi, Robert Larm and Sanford Masada; and the Court having reviewed the memorandum and exhibits submitted and hearing the arguments of counsel and being otherwise fully advised in the premises.

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Plaintiff is precluded from calling any additional experts who were not properly disclosed to Defendants pursuant to the Rule 16 Scheduling Conference Order and amendments thereto. Therefore, it is hereby ordered that Defendants' Motion in Limine No. 8 is GRANTED.

Dated: Honolulu, Hawaii SEP 20 2004.

/s/ KEVIN S.C. CHANG
Honorable Kevin S.C. Chang
Judge of the above-entitled Court

APPROVED AS TO FORM:

/s/ANDRE' S. WOOTEN
ANDRE' S. WOOTEN
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

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|---|---|
| MATTHEW HARRELL | ) |
| | ) CV No. 01-00555 |
| Plaintiff, | ) MEA-KSC |
| | ) CV No. 02-00223 |
| vs. | ) MEA-KSC |
| | ) [Cases Consolidated] |
| CITY AND COUNTY OF HONOLULU, a Municipal Corporation, ROYAL HAWAIIAN BAND, AARON MAHI, Senior Director, ROBERT LARM, and SANFORD MASADA, | ) |
| Defendants. | ) |
| | ) |
| MATTHEW HARRELL | ) |
| Plaintiff, | ) |
| vs. | ) |
| CITY AND COUNTY OF HONOLULU, a Municipal Corporation, ROYAL HAWAIIAN BAND, the Department of the City of Honolulu, and AARON MAHI Senior Director of the Royal | ) |

Hawaiian Band. )
)
Defendants. )
)

ORDER DENYING PLAINTIFF'S MOTION FOR JUDGEMENT AS A MATTER OF LAW OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

MARVIN E. ASPEN, District Judge:

Immediately following an adverse jury verdict, Plaintiff Matthew Harrell renewed his motion for a mistrial based on the alleged lack of African-American jurors in the venire (addressed in a separate order) and orally moved for judgment as a matter of law. In his February 12, 2006 supporting memorandum, Harrell seeks judgment as a matter of law and a new trial under Federal Rules of Civil Procedure 50 and 59 based on insufficiency of the evidence. Defendants City and County of Honolulu, the Royal Hawaiian Band, Aaron Mahi, Sr., Robert Larm and Sanford Masada (collectively the "City Defendants") opposed Harrell's motions on their merits. As discussed below, we deny both of Harrell's motions.

## BACKGROUND

### A. *Procedural Background*[1]

[1] In lieu of including a detailed description of the trial proceedings, we will simply discuss additional facts as needed below

On January 4, 2006, we began the trial of Harrell's discrimination and retaliation lawsuit against the City Defendants based in their failure to hire him as a solo bassoonist for the Royal Hawaiian Band ("Band"). When Harrell completed presentation of his case on January 10, the City Defendants moved for judgment as a matter of law. (Jan. 10, 2006 Trial Tr. at 75-78.) At the close of all the evidence the following day, the City Defendants renewed their motion. (Jan. 11, 2006 Trial Tr. at 15.) Harrell did not move for judgment as a matter of law after the City Defendants' evidence, or at the close of all evidence. Instead, Harrell renewed his request for a mistrial and moved for judgment as a matter of law following the jury's verdict in favor of the City Defendants on all counts. (Jan. 12, 2006 Trial Tr. at 5.) On February 12, 2006, and pursuant to the Court's briefing schedule, Harrell filed a memorandum in support of his motion for judgment as a matter of law. At that time he added, in the alternative, a motion for a new trial under Federal Rule of Civil Procedure 59. Final judgment was entered in favor of the City Defendants on March 13, 2006.

*B. Applicable Legal Background*

Before addressing Harrell's motions, we review the legal standards governing his discrimination and retaliation claims. The familiar standards from *McDonnell Douglas Corp. v. Green* govern Harrell's race discrimination claim. 411 U.S. 792, 803-803, 93 S.Ct. 1817, 1824-1825 (1973). To make out a *prima facie* case under the framework, a Title VII plaintiff must show:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

*Id.* at 802. If the plaintiff establishes a *prima facie* case, a rebuttable presumption arises that the employer engaged in unlawful discrimination. *Dominiguez-Curry v. Nevada Transp. Dep't*, 424 F.3d 1027, 1037 (9th Cir. 2005).

"[T]he burden of production – but not persuasion – then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the challenged action." *McDonnell Douglas Corp.*, 411 U.S. at 802. If the employer does so, the plaintiff must prove that the employer's stated reason is pretextual "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proferred explanation is unworthy of credence." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir. 2002) (internal quotation omitted); *Dominiguez-Curry*, 424 F.3d at 1037. Should the plaintiff show pretext, the *McDonnell Douglas* framework disappears and "the sole remaining issues [i]s discrimination *vel non*." *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 142-143, 120 S.Ct. 2097, 2106 (2000); *Villiarimo*, 281 F.3d at 1062.

To establish a *prima facie* case for his retaliation claim, Harrell was required to show that:

(1) he engaged in protected activity; (2) he "suffered an adverse employment action;" and (3) a "causal link" exists between the protected activity and the employment action. *Funai v. Brownlee*, 369 F.Supp.2d 1222, 1226 (D.Haw. 2004). The burden-shifting *McDonnell Douglas* framework similarly applies to a retaliation claim, and, as with the discrimination analysis, the plaintiff retains the ultimate burden of persuasion. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 516-517, 113 S.Ct. 2742, 2752 (1993); *Funai*, 369 F.Supp.2d at 1226. On the whole, "[i]t is not enough...to *dis*believe the employer; the factfinder must *believe* plaintiff's explanation of intentional discrimination [and retaliation]." *St. Mary's Honor Ctr.*, 509 U.S. at 519.

With respect to his claims against the City Defendants in their official capacities, the City and County of Honolulu could be liable only if Harrell proved that his civil rights were violated pursuant to an official policy or custom. *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 3105-3106 (1985); *Monell v. Dep't Social Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037 (1978); see also *Brass v. County of Los Angeles*, 328 F.3d 1192, 1198 (9th Cir. 2003).

## ANALYSIS

### A. *Motion for Judgment as a Matter of Law*

Pursuant to Rule 50(a), a party may move for judgment as a matter of law (or directed verdict) "after the opposing party has been fully heard and *prior* to the submission of the case to the jury." *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003)

(emphasis added); Fed. R. Civ. P. 50(a)(2). More specifically, "a motion for a directed verdict *at the close of all the evidence* is a prerequisite for a [Rule 50] post-trial motion." *Herrington v. County of Sonoma*, 834 F.2d 1488, 1500 (9th Cir. 1988) (emphasis in the original); see *Farley Transp. Co. v. Sante Fe Trail Transp. Co.*, 786 F.2d 1342, 1346 (9th Cir. 1986). The Ninth Circuit strictly observes this requirement, and failure to comply generally precludes post-trial relief. *Janes v. Wal-Mart Stores, Inc.*, 279 F.3d 883, 886-887 (9th Cir. 2002); *Patel v. Penman*, 103 F.3d 868, 878 (9th Cir. 1996). Failure to move for directed verdict at the close of all the evidence may be excused only in extraordinary circumstances, where: (1) an earlier Rule 50 motion remains under advisement; (2) an inartful request was timely made and sufficiently approximates a motion for judgment as a matter of law; or (3) "there is such plain error apparent on the face of the record that failure to review 'would result in a manifest miscarriage of justice.'" *Herrington*, 834 F.2d at 1500 & n.11 (quoting *Williams v. Hughes Helicopters, Inc.*, 806 F.2d 1387, 1392 (9th Cir. 1986)); *Patel*, 103 F.3d at 878; *Farley Transp. Co.*, 786 F.2d at 1346-1347.

Although Harrell moved for judgment as a matter of law *after* the jury verdict was announced, he failed to do so during the trial. Unlike the City Defendants, Harrell did not submit any motion for directed verdict at the close of his opponents' evidence, or at the close of all the evidence. Because he neglected to file a Rule 50 motion prior to submission of the case to the jury, he cannot advance a post-trial motion challenging the sufficiency of the evidence. Fed. R. Civ.

P. 50(a)(2), (b); *Herrington*, 834 F.2d at 1500; *Farley Transp. Co.*, 786 F.2d 1345-1346.

Harrell has not articulated any excuse for his failure to comply with Rule 50, nor do any of the narrow exceptions apply. While he might personally believe that the verdict constitutes a miscarriage of justice, we cannot agree. We find no plain error in the trial record remotely suggesting any injustice. Even if we could identify plain error warranting further consideration, our review would be "limited to whether there was *any* evidence to support to the jury's verdict, irrespective if its sufficiency." *Patel*, 103 F.3d at 878 (emphasis added) (internal quotations omitted); *Herrington*, 834 F.2d at 1500-1501. In this case, the City Defendants presented evidence at trial that supports the jury's verdict on the discrimination and retaliation claims. For example, several witnesses testified that Harrell was excessively nervous during the audition and that he had problems with his bassoon reed not experienced by other candidates. These witnesses – including Harrell's own expert, Paul Barrett – identified numerous flaws with his performance, such as air leakage, pitch wavering, lack of endurance and difficulty coordinating with the conductor. Harrell was ranked last of the three applicants for the permanent bassoon position and has been ranked last of potential on-call bassoonists prior to his discrimination complaint. As this (and other) evidence exists to support the verdict, Harrell would not be entitled to judgment as a matter of law, even if plain error required us to consider the question. Because Harrell failed to move for directed verdict at the close of evidence and cannot avail himself of the

relevant exceptions, we deny his motion for judgment as a matter of law.

*B. Motion for New Trial*

Although the court must exercise some discretion in considering a Rule 59 motion for a new trial, "a stringent standard applies when the motion is based on insufficiency of the evidence," as in this case. *Venegas v. Wagner*, 831 F.2d 1514, 1519 (9th Cir. 1987); *Digidyne Corp. v. Data Gen'l Corp.*, 734 F.2d 1336, 1347 (9th Cir. 1984); *Funai v. Brownlee*, 369 F.Supp.2d 1222, 1238-1239 (D.Haw. 2004). A motion for a new trial on such grounds may be granted: (1) where the verdict is contrary to the "clear weight of the evidence;" (2) where evidence demonstrates that "the jury has reached a seriously erroneous result;" or (3) where it results in a miscarriage of justice." *Casumpang v. Int'l Longshore & Warehouse Union Local 142*, 411 F.Supp.2d 1201, 1213 (D.Haw. 2005); *Funai*, 369 F.Supp.2d at 1239-1239; *see also Venegas*, 831 F.2d at 1519; *EEOC v. Pape Lift, Inc.*, 115 F.3d 676, 680 (9th Cir. 1997). "In most cases, the judge should accept the findings of the jury; however, if the judge is left with the definite and firm conviction that a mistake has been committed, he may grant a new trial." *Casumpang*, 411 F.Supp.2d at 1213. Nonetheless, the court may not grant a new trial simply "because it might have come a different result from that reached by the jury." *Wilhelm v. Assoc. Container Transp. (Austl.) Ltd.*, 648 F.2d 1197, 1198 (9th Cir. 1981).

The jury determined that Harrell had not satisfied the burden of proof on his claims against the

City Defendants, and we do not find this conclusion to be against the clear weight of the evidence. Weighing all of the evidence and independently assessing the credibility of the witnesses, the jury's verdict "does not leave the Court with a definite or firm conviction that a mistake has been committed." *Casumpang*, 411 F.Supp.2d at 1215. After establishing a *prima facie* case for discrimination, Harrell alleges that evidence at trial showed that the City Defendants' decision not to hire him as a soloist due to his nervousness was "a clear pre-text." (Pl.'s Mot. at 7.) We cannot agree. Witness testimony, documentary evidence and even the audiotapes of the audition performances sufficiently demonstrated otherwise. While certain witnesses, including Barrett, acknowledged that all musicians have performance anxiety, the audition panelists also testified that Harrell appeared more nervous than the other applicants and that his performance suffered as a result. Barrett stated that Harrell had a performance anxiety problem, that "he cared too much," and that his lack of self-esteem affected his audition. (Jan. 10, 2006 Trial Tr. at 38-39.) The City Defendants thus presented a legitimate, non-discriminatory reason for their decision not to hire Harrell, which he failed to refute.

Harrell also insists that the City Defendants favored one of his competitors, Christopher Ventura, and provided Ventura the sheet music for the sight reading piece prior to the audition. (Pl.'s Mot. at 6, 13.) To the contrary, Wayne Oshima testified that the sheet music for only the prepared pieces were offered to the applicants in advance of the audition. (Jan. 10, 2006 Trial Tr. at 82-83.) He further clarified that the

sight reading pieces were *not* disclosed to the applicants. (*Id.* at 92.)

As to his retaliation claim, Harrell alleges that he was not called for part-time work with the Band after filing his administrative complaint. He apparently contends that his testimony, along with that of Barrett and of defendant Robert Larm, demonstrated that the City Defendants refused to hire him for part-time work even when he was available to play. (Pl.'s Mot. at 14..) However, this testimony neither supports his argument, nor warrants a new trial. Barrett, for example, did not testify substantively at all about Harrell's part-time engagements. (Jan. 10, 2006 Trial Tr. at 22-24.) He had no personal knowledge about the performance in Mililani where the band allegedly performed without a bassoonist and had not contacted Harrell.[2] (*Id.*)

Moreover, Larm testified that the ranking of musicians on the part-time list was based on ability. (*Id.* at 99-100.) Harrell was ranked at the bottom of that list prior to his civil rights complaint and was the bassoonist least frequently called for part-time assignment. According to Larm, Harrell declined at least one invitation to play due to his school schedule. Harrell later informed the Band that he was not comfortable playing part-time unless given a chance to practice in advance, which is not always possible given the last-minute nature of on-call work. Finally,

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[2] Based on the information he received from Harrell, Barrett testified that he thought the Mililani concert occurred before the audition and thus, before Harrell's administrative complaint. (Jan. 10, 2006 Trial Tr. at 23.)

testimony confirmed that placement on the part-time list was not a guarantee that any particular musician would be called. Considering all of the evidence, the jury committed no error by concluding that the City Defendants did not retaliate against Harrell.

In his motion,[3] Harrell ultimately attacks the credibility of the defense witnesses. He inaccurately contends that the individual defendants "just plain lied when the[y] criticized Plaintiff's playing, saying he leaked air and was more nervous than the other applicants. None of which, they even admitted, could not [sic] be heard on the tape." (Pl's Mot. at 13.) As discussed above, multiple witnesses – including Barrett, Harrell's expert, teacher and personal friend – credibly described his substantial performance anxiety and its likely effects. Moreover, each of the audition panelists testified that they heard the same problems, including buzzing, air leakage and pitch wavering, on the audiotapes that they identified at Harrell's audition. (Jan. 10, 2006 Trial Tr. at 102, 103, 116.) The jury apparently felt these witnesses were believable. Indeed, each of the primary witnesses (including Harrell, Barrett and the individual defendants) testified in a consistent, forthcoming and sincere manner. Based on the witnesses' demeanors and testimony, we find no fault with the jury's

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[3] Harrell's motion includes a fair amount of irrelevant information. He spends nearly two pages vaguely describing historical musical connections between Africans, African-Americans and Hawaiians, which have little – if any – bearing on this case.

conclusions.[4]

## CONCLUSION

For the reasons described above, Harrell's motions for judgment as a matter of law and for a new trial are denied. It is so ordered.

/s/ MARVIN E. ASPEN
MARVIN E. ASPEN
United States District Judge

Dated: 4/20/06

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[4] Because we find that Harrell is not entitled to a new trial, we need not address whether there was sufficient evidence to hold the City and County of Honolulu liable for the acts of the individual defendants.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

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| MATTHEW HARRELL | ) |
| | ) CV No. 01-00555 |
| Plaintiff. | ) MEA-KSC |
| | ) CV No. 02-00223 |
| vs. | ) MEA-KSC |
| | ) [Cases Consolidated] |
| CITY AND COUNTY OF HONOLULU, a Municipal Corporation, ROYAL HAWAIIAN BAND, AARON MAHI, Senior Director, ROBERT LARM, and SANFORD MASADA, | ) |
| Defendants. | ) |
| | ) |
| MATTHEW HARRELL | ) |
| Plaintiff, | ) |
| vs. | ) |
| CITY AND COUNTY OF HONOLULU, a Municipal Corporation, ROYAL HAWAIIAN BAND, the Department of the City of Honolulu, and AARON MAHI, Senior Director of the Royal | ) |

Hawaiian Band. )
)
Defendants. )
)

ORDER DENYING PLAINTIFF'S
MOTION FOR MISTRIAL

MARVIN E. ASPEN, District Judge:

On January 6, 2006, Plaintiff Matthew Harrell filed an "Objection to Lack of Black Jurors in Jury Panel & Motion for Mistrial," which we denied without prejudice. After an adverse jury verdict, Harrell renewed his motion for mistrial. In his Supplemental Memorandum, Harrell claims that his constitutional right to a trial by a jury of his peers was violated because the jury pool for his discrimination and retaliation action failed to include any African-Americans. In addition, he claims that the district court's preclusion of active military personnel stationed in Hawaii from potential jury service is unconstitutional and unfair. (Supp. Mem. at 5-10.) Defendants City and County of Honolulu, the Royal Hawaiian Band, Aaron Mahi, Sr., Robert Larm and Sanford Masada (collectively the "City Defendants") counter that Harrell's motion is untimely, unfounded and fails to demonstrate any constitutional violation. As set forth below, we deny Harrell's motion.

## BACKGROUND

On the morning of January 4, 2006, and outside

the presence of the jury pool, counsel for Harrell and the City Defendants addressed Harrell's motion requesting the random selection of jurors using the wheel in open court. After we granted that motion, Harrell's counsel observed that none of the potential jurors identified themselves as African-American on their information cards. At that time, Harrell's counsel agreed that no objection would be appropriate until after meeting the jurors. (Jan 4, 2006 Trial Tr. at 6-7.)

Shortly thereafter, we questioned the sixteen potential jurors whose names were initially drawn from the wheel and allowed counsel several minutes to pose additional voir dire questions. Although counsel for the City Defendants asked follow-up questions, Harrell's counsel declined to do so. (*Id.* at 38-41.) Significantly, he did not object to the constitution of the venire of the potential petit jury, either before or after voir dire. Harrell's counsel also did not object to the City Defendants' exercise of their peremptory challenges. (*Id.* at 44-46.)

At the conclusion of voir dire, eight of the potential jurors were excused, based largely on the parties' peremptory challenges and juror needs. As a result, the selected eight jurors were sworn and we excused the remaining potential jurors. (*Id.*)

Following a short recess, seven of the eight jurors returned for preliminary instructions (*Id.* at 46-47.) During the break, the eighth juror apparently realized that he had a scheduling conflict with the trial and requested to be excused. We informed counsel of this development and inquired if they were willing to proceed with a jury of seven. Harrell's counsel acknowledged it was "an unfortunate situation" but

stated that Harrell would proceed to trial with the jury of seven members. (*Id.* at 47.) He presented his initial oral motion for mistrial the following morning.

Harrell alleges that the absence of African-Americans in the jury pool violated his equal protection rights as guaranteed by the Fourth Amendment.[1] (Supp. Mem. at 1-3, 11-12.) He argues that since African-Americans constitute 2% or 3% of the Hawaiian population, at least 2 or 3 should have appeared in the random jury pool. (*Id.* at 2-3.) He further alleges that the district court's exclusion of military personnel from the potential juror pool prevents approximately 50,000 - 60,000 black men and women from becoming jurors. (*Id.* at 5.)

## ANALYSIS

*(1) Timeliness*

As the City Defendants contend, Harrell's objection to the jury pool is untimely. It is well-established that objections concerning the jury selection process "must occur as soon as possible, preferably before the jury is sworn." *Dias c. Sky Chefs. Inc.*, 948 F.2d 532, 534 (9th Cir. 1991) (addressing

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[1] Harrell does not claim that the selection of his jury resulted in any violation of the Jury Selection and Service Act ("JSSA"), 28 U.S.C. § 1861 *et seq.* Harrell's failure to raise a JSSA issue prior to voir dire examination precluded any such statutory claim. 28 U.S.C. § 1867(c) (allowing party to move to stay the proceedings only if the party objects "before the voir dire examination begins, or within seven days [of discovering] ... grounds therefor").

objections raised under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct 1712 (1986)); see also *Morning v. Zapata Protein (USA), Inc.*, 128 F.3d 213, 216 (4th Cir. 1997) (holding that "a *Batson* challenge raised after the venire has been excused has been raised too late"). In *Dias*, for example, the defendant employer did not object to the female plaintiff's use of peremptory challenges to eliminate males from the jury until "after the excluded jurors had been dismissed, the jury had been sworn, the court had recessed and reconvened, defendant's motions in limine had been presented and argued, and defendant noted several other objections." 948 F.2d at 533. The Ninth Circuit held that this delay resulted in waiver of the challenge. *Id.* at 534.

In this case, and although he admittedly knew from the information cards that the jury pool might not include African-Americans, Harrell neglected to challenge the jury selection process until well after voir dire concluded, after the eight jurors were impaneled and after the remaining venire was dismissed. At no time during the jury selection process did Harrell object to the racial make-up of the jury pool, the potential jurors subjected to voir dire, the peremptory challenges exercised by the City Defendants or the final panel. Moreover, Harrell explicitly *consented* to the jury of seven non-African-American jurors, even after having another opportunity to object upon dismissal of the eighth due to a scheduling conflict. Accordingly, Harrell waived any constitutional challenge to the jury selection

process, and his motion must be denied.[2]

*B Constitutional Claims*

Even if Harrell had not waived his constitutional claims, he fails to allege a *prima facie* case for violation of either his Fifth[3] or Sixth Amendment rights. We assume that Harrell's reference to *Batson v. Kentucky* in his brief was an oversight, as he concedes that the City Defendants did not utilize peremptory challenges to exclude African-Americans from the jury. (Supp. Mem. at 2-3.) Rather, we construe his motion to allege a violation of his right to a jury selected from a fair cross-section of the community. While such a claim may proceed as either a Sixth Amendment or an equal protection claim. Harrell alleges only a Sixth Amendment violation. (Supp. Mem. at 10.) See *Duren v. Missouri*, 439 U.S. 357, 358, 364, 99 S.Ct. 664, 666, 668 (1979) (Sixth

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[2] A circuit split seems to exist as to whether failure to comply with JSSA procedures also waives a party's related constitutional claims. Compare *U.S. v. Young*, 822 F.2d 1234, 1239 (2d Cir. 1987) (no waiver) with U.S. Green, 742 F.2d 609, 611-612 (11th Cir. 1984 (waiver). We need not speculate how the Ninth Circuit might rule if faced with that ancillary question, as Harrell's claims were waived nonetheless.

[3] Although Harrell alleges deprivation of his Fourteenth Amendment equal protection rights, "a claim of discrimination by the federal government implicates the equivalent equal protection guarantee inherent in the Due Process Clause of the Fifth Amendment." *United States v. Rodriguez-Lara*, 421 F.3d 932, 937 n.2 (9th Cir. 2005); *see Bolling v. Sharpe*, 347 U.S. 497, 498-499, 74 S.Ct. 693, 694 (1954)

Amendment claim): *Castaneda v. Partida*, 430 U.S. 482, 490, 494, 97 S.Ct. 1272, 1278 (1977) (equal protection claim). Accordingly, we will analyze his claim under the less demanding Sixth Amendment framework.[4]

As described by the Supreme Court in *Duren*, a party alleging a Sixth Amendment fair cross-section violation must show:

> (1) that the group to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

439 U.S. at 364; *see Rodriguez-Lara*, 421 F.3d at 940-943; *United States v. Esquivel*, 88 F.3d 722, 725-727 (9th Cir. 1996). To satisfy the second prong of the *Duren* test, movant must provide objective data, typically statistical figures, demonstrating that "the jury pool does not adequately represent the distinctive group in relation to the number of such persons in the community." *Esquivel*, 88 F.3d at 726; *see Rodriguez-*

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4 The *Castaneda* equal protection analysis requires a showing: (1) "is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied;" (2) the degree of underrepresentation, using population comparison statistics; and (3) that the selection procedure is susceptible of abuse or is not racially neutral." 430 U.S. at 494; *see Rodriguez-Lara*, 421 F.3d at 943.

*Lara*, 421 F.3d at 943 (holding that movant must use total population figures for comparison purposes on a *Duren* claim.) Pursuant to Ninth Circuit precedent, a court must consider the "absolute disparity" of the representativeness of the jury pool, which is simple mathematical "difference between the pool." *Rodriguez-Lara*, 421 F.3d at 943 (reiterating use of absolute disparity analysis as opposed to comparative disparity analysis). The third *Duren* prong requires a showing of systematic, though not necessarily intentional, exclusion of the group from the venire. *Id.* at 944-945; *United States v. Randolph*, 380 F.3d 1133, 1140-1142 (9th Cir. 2004).

Harrell fails to satisfy the second and third elements of the *Duren* test.[5] As the City Defendants observed, we cannot be certain that the venire panel lacked African-Americans. (Mem. in Opp'n at 6.) Yet assuming for purposes of this motion that the panel contained no African-Americans, and further assuming that Harrell's unsupported 2% or 3% population figure is accurate, Harrell has established at best a 3% absolute disparity.[6] (Supp. Mem. at 2.) *See Rodriguez-Lara*, 421 F.3d at 943; *Esquivel*, 88 F.3d at 726. In the Ninth Circuit, an absolute disparity of 7.7% or lower is not considered evidence of underrepresentation.

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[5] The City Defendants do not contest (nor could they) that African-Americans are a distinctive group within the community (the first element of the *Duren* test).

[6] We agree with the City Defendants that Harrell's repeated reference to the percentage of African-Americans incarcerated in Hawaiian prisons is irrelevant.

*Rodriguez-Lara*, 421 F.3d at 943; See *United States v. Cannady*, 54 F.3d 544, 548 (9th Cir. 1995); *United States v. Suttiswad*, 696 F.2d 645, 649 (9th Cir. 1982); see also *United States v. Sanchez-Lopez*, 879 F.2d 541, 547-549 (9th Cir. 1989). Thus, Harrell cannot establish a *prima facie* case for violation of the fair cross-section requirement.[-]

As to the third *Duren* element, Harrell claims that exemption of military personnel from the jury selection process effectively and systematically excludes African-Americans, who constitute 50% (approximately 60,000 people) of military personnel living in Hawaii. Again, Harrell cites no authority for these figures. Nonetheless, he urges that military personnel should be eligible for jury selection. (Supp. Mem. at 5-8, 10.)

As required by the JSSA, the district court precludes certain individuals – including full-time active military personnel – from jury service. The JSSA unambiguously states that the district court, in devising a plan for the random selection of federal jurors, must "specify that the following persons are

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- Like the Ninth Circuit in Rodriguez-Lara we observe the obvious shortcoming in exclusively utilizing the absolute disparity analysis. 421 F.3d at 943 n.10. The "necessary implication" of existing precedent "is that if a distinctive group makes up 7.7% or less of the community, then the fair cross-section requirement offers no redress even if that group is *entirely shut out of the jury pool*." *Id.* (emphasis in original). Regardless, because Harrell waived all challenges to his jury pool and fails to establish the third *Duren* element, our reliance on the absolute disparity approach could not have worked to his disadvantage here.

barred from jury service on the ground that they are exempt: (A) members in active service in the Armed Forces of the United States." 28 U.S.C. § 1863(b)(6) (emphasis added). When evaluating a Louisiana juror qualification law, the Supreme Court observed that such an exemption based on occupational class is permissible so long as the "uninterrupted performance" of that occupation is crucial to the community's welfare". *Taylor v. Louisiana*, 419 U.S. 522, 534, 95 S.Ct. 692, 700 (1975); see also *Rawlins v. Georgia*, 201 U.S. 638, 640, 26 S.Ct 560, 561 (1906). Likewise – and in rejecting an argument similar to Harrell's – the Fifth Circuit explicitly held that "the exclusion of military personnel from [federal] jury service is reasonable and for the good of the community." *Gov't of the Canal Zone v. Scott*, 502 F.2d 566, 568-569 (5th Cir. 1974). In light of these persuasive authorities and the clarity and purpose of the JSSA's military exemption, we conclude that compliance with the JSSA could not establish the third *Duren* factor.[8]

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[8] To the extent that Harrell claims that 'the exclusion of service [people] ... deprived him of his right" to a jury comprised of a fair cross-section of the community "because of the divergence in racial composition between military contingent in [Hawaii] and the civilian population," we (like the *Scott* court) have no evidentiary basis to entertain such an argument. *Scott*, 502 F.2d at 569. Regardless, assuming *arguendo* that Harrell's statistics are reliable, he would be unable to prove a constitutional violation, *even if* 60,000 military personnel were eligible for jury service. As Harrell alleges that 30,000 African-American civilians represent 2% of the population (and the U.S. Census Bureau reports it as 1.8% as of 2000), the addition of 60,000 .. (continued)

## CONCLUSION

For the reasons described above, Harrell's motion for a mistrial is denied. It is so ordered.

/s/ MARVIN E. ASPEN
MARVIN E. ASPEN
United States District Judge

Dated: 4/20/06

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[3] (continued) ...African-Americans into the jury-eligible population would raise the percentage to approximately 6% or 7%. *See* U.S. Census Bureau, *Hawaii QuickFacts*, *at* http://quickfacts.census.gov/qfd/states/15000.html (last revised Jan. 12, 2006). Even if none of the 90,000 were called to trial (or the second trial he seeks), he likely could not demonstrate an absolute disparity sufficient to satisfy the second *Duren* prong.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| MATTHEW HARRELL | ) | No. 06-16142 |
| | ) | |
| Plaintiff-Appellant; | ) | D.C. Nos. |
| | ) | CV-02-00223- |
| v. | ) | MEA |
| | ) | CV-01-00555- |
| CITY AND COUNTY OF HONOLULU, | ) | OWW |
| | ) | |
| | ) | |
| Defendant-Appellee. | ) | |
| | ) | |

Appeal from the United States District Court
for the District of Hawaii
Marvin E. Aspen, District Judge, Presiding

Argued and Submitted March 13, 2008
San Francisco, California

Before: RYMER, RAWLINSON, and CALLAHAN, Circuit Judges.

Matthew Harrell. an African-American bassoonist. brought discrimination and retaliation claims against the City and County of Honolulu and certain employees (herein referred to collectively as "the City") because he was not offered the position of bassoonist in the Royal Hawaiian Band ("the Band"). Harrell's claims were tried to a jury. which returned a verdict in favor of the City.

On appeal Harrell seeks to challenge the district court's disposition of several of the City's motions in limine. the composition of the jury pool and jury, the denial of relief on his motion for a judgment as a matter of law, and the denial of his motion for a new trial. We determine that the district court did not abuse its discretion in ruling on the City's motions in limine, that Harrell failed to preserve several of his objections to the jury and the trial, and that there was sufficient evidence to support the jury's verdict.[9]

Initially we observe that, as noted by the City, Harrell's brief fails to comply with Federal Rule of Appellate Procedure 28 and Ninth Circuit Rules 28-2.5, 28-2.9 and 30-14. Most troublesome is the failure to support both the statement of facts and the argument with appropriate cites to the district court record. Nonetheless, the deficiencies although substantial, do not compel the dismissal of the appeal. See *Sekiya v. Gates*, 508 F.3d 1198. 1200 (9th Cir.

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1 Because the parties are familiar with the facts and procedural history , we do not restate them here except as necessary tp explain our disposition.

2007) ("Sekiya's opening brief is so deficient that we are compelled to strike it in its entirety and dismiss the appeal."); *Ward v. Circus Circus Casinos, Inc.*, 473 F.3d 994, 997 (9th Cir. 2007) (declining to dismiss an appeal where the "procedural violations were not so egregious as to prevent Circus from meaningfully responding to the appeal".)

1. Harrell has failed to show any abuse of discretion in the district court's evidentiary rulings

Harrell challenges the district court's rulings on four motions in limine. The district court's evidentiary rulings are reviewed for abuse of discretion. *E.E.O.C. v. Pape Lift, Ins.*, 115 F.3d 676, 680 (9th Cir. 1997).

First, he objects to the district court's grant of the City's Motion Limine No. 3, prohibiting Harrell or others from playing the bassoon before the jury. The court, however, did not allow an audiotape of the audition to be played to the jury. As this was the best evidence of Harrell's performance at the audition, Harrell has failed to show that the grant of Motion in Limine No. 3 was an abuse of discretion.

Second, Harrell challenges the district court's partial grant of the City's Motion in Limine No. 4, which excluded a magazine article and all but a single excerpt of a book. Both the article and the book concerned the historic role of African-Americans in Hawaii and mentioned their role in the formation of the Band in the mid-nineteenth century. The excluded materials do not appear to directly address the Royal Hawaiian Band or the time period during which Harrell played with the Band. Nothing in Harrell's

brief or the record suggests that the excluded material has any "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence". Federal Rule of Evidence 401. Accordingly, Harrell has not shown that the district court's disposition of Motion in Limine No. 4 was an abuse of discretion.

Third, Harrell objects to the district court's grant of the City's Motion in Limine No. 8 which precluded Harrell from offering the testimony of two proposed expert witnesses. The district court granted the motion because Harrell had not complied with its Rule 16 Scheduling Conference Order which required the parties to identify their prospective expert witnesses and their reports by a certain date. Harrell argues that the names of the two witnesses, two professors, appear on his witness list. A review of Harrell's list reveals that the professors are listed, but that are not designated as experts and no indication is given of their qualifications or the substance of their proposed testimony. Harrell has not shown that the district court abused its discretion in granting the City's Motion in Limine No. 8.

Fourth, Harrell challenges the district court's grant of the City's Motion in Limine No. 9, which excluded hearsay statements in Harrell's complaints to the Hawaii Civil Rights Commission and the Equal Employment Opportunity Commission. However, in the district court, Harrell based his objection generally on the business record and public record exceptions to the rule against hearsay and did not explain how these exceptions applied to his complaints or the particular

hearsay statements in the complaints. Harrell has not shown that the district court abused its discretion in denying the City's Motion in Limine No. 9.

2. The district court properly denied Harrell's motion for a mistrial.

Jury selection commenced in January 4. 2006. Harrell's counsel noted that from the jury cards none of the potential jurors identified himself or herself as African-American but agreed that no objection would be appropriate until after he viewed the jurors. A jury was selected and sworn. and testimony was heard on January 5. 2006. the second day of trial. On January 6. 2006. Harrell filed a motion for mistrial objecting to the lack of African-Americans on the jury. The district court initially denied the motion without prejudice. After the trial Harrell filed a memorandum in support of his prior motion for mistrial, and on April 20. 2006. the trial court entered an order denying Harrell's motion for mistrial. The district court held that the objection to the jury pool was untimely. because it was not made before the jury was sworn in. citing *Dias v. Sky Chefs, Inc.*, 948 F.2d 532, 534 (9th Cir. 1991). The court further commented that even if Harrell had not waived his constitutional claims, his Sixth Amendment challenge that the jury was not selected for a fair cross-section of the community failed under the standard set forth in *Duren v. Missouri*. 439 U.S. 357 (1979). Specifically, the court found that even accepting Harrell's unsupported claim that African-Americans constituted 3 percent of the population. in the Ninth Circuit an absolute disparity of 3 percent is

too low to be considered evidence of underrepresentation. See *United States v. Rodriguez-Lara*, 421 F.3d 932, 943 (9th Cir. 2005). The court further noted that the exclusion of full time active military personnel from jury service was set forth in 28 U.S.C. § 1863(b)(6), and that in Taylor v. Louisiana, 419 U.S. 522, 534 (1975), the Supreme Court had upheld exempting from jury service "those engaged in particular occupations the uninterrupted performance of which is critical to the community's welfare."

We review the district court's denial of a motion for mistrial for abuse of discretion. *United States v. Allen*, 341 F.3d 870, 891 (9th Cir. 2003). Here, we agree with the district court that the motion was both untimely and without merit. Harrell has offered no excuse for his failure to challenge the composition of the jury and the jury pool before the jury was sworn and taking the testimony, and our review of the record does not disclose any good reason for his failure. Moreover, Harrell has failed to distinguish his case from the controlling precedents of *Taylor* and *Rodriguez-Lara*.

3. Harrell was procedurally barred from moving for Judgment as Matter of Law (JMOL)

A litigant is procedurally barred from moving for JMOL after a jury verdict unless he has first moved for JMOL at the conclusion of evidence and before submission to the jury, unless (a) an earlier motion under Federal Rule of Civil Procedure 50 remains pending, (b) an inartful request was timely made and approximates a motion for JMOL, or (c)

there is such plain error that failure to review would result in a manifest miscarriage of justice. *Herrington v. County of Sonoma*, 834 F.2d 1488, 1500 (9th Cir. 1988). The denial of a properly made motion for JMOL is reviewed de novo. *Janes v. Wal-Mart Stores, Inc.*, 279 F.3d 883, 886 (9th Cir. 2002). If, however, the record contains relevant evidence that reasonably supports the jury's verdict, the denial of the motion must be affirmed. *Grant v. City of Long Beach*, 315 F.3d 1081, 1085 (9th Cir. 2002).

The record shows, as the district court noted, that Harrell did not file a motion for JMOL after the City presented its case or at the close of all evidence. On appeal, Harrell does not contend otherwise and does not argue that any of the exceptions in *Herrington* apply. Our review of the record confirms that there was no earlier Rule 50 motion or timely but inartful approximation thereof under advisement. In addition, for the reasons that we affirm the denial of Harrell's motion for new trial (*see infra*) we find no miscarriage of justice in the district court's denial of the motion for JMOL as procedurally barred.

4. Harrell has not shown that the district court erred in denying his motion for a new trial

"We review a denial of a motion for new trial for abuse of discretion, and we can reverse such a denial only if the district court makes a legal error in applying the standard for a new trial or the record contains no evidence that can support the verdict." *Alford v. Haner*, 446 F.3d 935, 936 *9th Cir. 2006).

On appeal, Harrell asserts only that there was

insufficient evidence to support the jury's verdict. Harrell contends that the City did not offer him the position as bassoonist in the Band because of the Band Master's subjective, and Harrell contends biased, lack of confidence in Harrell's ability to perform. Although the jury might have agreed with Harrell, there was substantial evidence before the jury from which it could reasonably conclude that the decision was not racially motivated. The jury heard the tape as well as testimony that Harrell played nervously for a solo position and that his performance was flawed. In light of this, we respectfully disagree with our colleague: we cannot find that the record "contains no evidence that can support the verdict," *id.* at 936, or that the jury's decision is against the weight of the evidence, or was seriously erroneous result. See *E.E.O.C. v. Pape Lift, Ins.*, 115 F.3d at 680.

For the foregoing reasons the district court's judgment for the City is AFFIRMED.

RAWLINSON, Circuit Judge, dissenting in part:

I respectfully dissent from that portion of the disposition concluding that the district court acted within its discretion when it denied Plaintiff Matthew Harrell's motion for a new trial. Although I expressly decline to join the extended discussion of Harrell's challenges to the district court's evidentiary rulings, denial of his requested motion for a mistrial and denial of his motion for judgment as a matter of law, I agree that the district court's rulings on those issues should be affirmed.

However, I respectfully dissent from that

portion of the disposition affirming the denial of Harrell's motion for a new trial. In my view, the district court abused its discretion when it denied Harrell's motion for a new trial because the record contains no evidence to support the jury's verdict.

From my perspective, the fallacy on the conclusion that evidence in the record supports the jury's verdict stems from a profound misapplication of the caselaw interpreting applicable discrimination statutes.

There is no dispute that the reason given by the decisionmaker for failing to select Harrell was his performance at the audition. However, that reason is clearly pretextual because despite the allegedly deficient performance, Harrell was nevertheless rated qualified for the position. Once an applicant is deemed qualified, it defies commonsense to countenance later rejection of the applicant on the basis that he was no longer qualified. See Norris v. City and County of San Francisco, 900 F.2d 1326, 1330 (9th Cir. 1990) (providing that pretext is established if an employer's explanation is unworthy of credence). Because I am convinced that the employer's claim that Harrell was unqualified is not supported by the record, I conclude that the record does not support the jury's finding of no discrimination. As a result, I would hold that the district court abused its discretion when it denied Harrell's motion for a new trial. See *Alford v. Haner*, 446 F.3d 935, 936 (9th Cir. 2006) (recognizing that a new trial should be granted if the record contains no evidence to support the verdict).

(Filed June 20, 2008)

122

(2)

No. 08-988

Supreme Court, U.S.
FILED
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# In The
# Supreme Court of the United States

MATTHEW HARRELL,

*Petitioner,*

v.

CITY AND COUNTY OF HONOLULU,
A Municipal Corporation, AARON MAHI, Sr., Director,
ROBERT LARM, and SANFORD MASADA,

*Respondents.*

**On Petition For A Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Ninth Circuit**

## RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals correctly affirmed the District Court's disposition of the City's Motions in Limine, the Petitioner's objections to the composition of the jury pool and the jury, the denial of his motion for judgment as a matter of law, and the denial of his motion for a new trial.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| STATEMENT OF THE CASE | 1 |
| STATEMENT OF FACTS | 2 |
| REASONS FOR DENYING THE PETITION | 4 |
| A. There Was No Abuse of Discretion in the District Court's Evidentiary Rulings | 4 |
| (1) Motion in Limine No. 4 | 4 |
| (2) Motion in Limine No. 8 | 5 |
| (3) Motion in Limine No. 9 | 5 |
| B. There Was No Error in the Denials of the Motion For Mistrial | 6 |
| C. There Was No Error in Procedurally Barring the Petitioner's Untimely Request for a Motion for Judgment as a Matter of Law | 7 |
| D. There Was No Error in the Denial of the Petitioner's Motion for New Trial | 8 |
| CONCLUSION | 12 |

# TABLE OF AUTHORITIES

Page

CASES

*Alford v. Haner*, 446 F.3d 935 (9th Cir. 2006) ..... 9

*Dias v. Sky Chefs, Inc.*, 948 F.2d 532 (9th Cir. 1991) ..... 6

*Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664 (1979) ..... 6

*E.E.O.C. v. Pape Lifts, Ins.*, 115 F.3d 676 (9th Cir. 1997) ..... 5, 9, 10

*Gov't of the Canal Zone v. Scott*, 502 F.2d 566 (5th Cir. 1974) ..... 7

*Grant v. City of Long Beach*, 315 F.3d 1081 (9th Cir. 2002) ..... 8

*Graves v. City of Coeur D'Alene*, 339 F.3d 828 (9th Cir. 2003) ..... 9

*Harrell v. City and County of Honolulu*, unpublished, 283 Fed.Appx. 509 (9th Cir. 2008) ..... 10

*Herrington v. County of Sonoma*, 834 F.2d 1488 (9th Cir. 1988) ..... 8

*Heyne v. Caruso*, 69 F.3d 1475 (9th Cir. 1995) ..... 5

*Janes v. Wal-Mart Stores, Inc.*, 279 F.3d 883 (9th Cir. 2002) ..... 7

*Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365 (9th Cir. 1987) ..... 9

*Morning v. Zapata Protein (USA), Inc.*, 128 F.3d 213 (4th Cir. 1997) ..... 6

TABLE OF AUTHORITIES – Continued

Page

*Norris v. City and County of San Francisco*, 900 F.2d 1326 (9th Cir. 1990) ..... 10, 11

*Rawlins v. Georgia*, 201 U.S. 638, 26 S.Ct. 560 (1906) ..... 7

*Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692 (1975) ..... 7

*United States v. Allen*, 341 F.3d 870 (9th Cir. 2003) ..... 7

*Venegas v. Wagner*, 831 F.2d 1514 (9th Cir. 1987) ..... 9

CONSTITUTIONAL PROVISIONS

Sixth Amendment, U.S. Constitution ..... 6

RULES

Rule 10, *Rules of the Supreme Court of the United States* ..... 2, 12

Rule 26, *Federal Rules of Civil Procedure* ..... 5

Rule 50, *Federal Rules of Civil Procedure* ..... 1, 7, 8

Rule 50(a)(1), *Federal Rules of Civil Procedure* ..... 8

STATUTES

28 U.S.C. § 1863(b)(6) ..... 7

42 U.S.C. § 1981a ..... 1

42 U.S.C. § 1983 ..... 1

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 1985 .....1

42 U.S.C. § 1986 .....1

42 U.S.C. § 2000e-3(a) .....1

## STATEMENT OF THE CASE

The instant action is one in which relief was sought under 42 U.S.C. §§ 1981a 1983, 1985, 1986 and 2000e-3(a) for alleged employment discrimination on the basis of race.

Petitioner was unsuccessful at trial and now seeks to challenge various adverse District Court rulings. Specifically, Petitioner challenges the District Court's orders granting Respondent's motions *in limine* precluding certain evidence he sought to offer at trial. Petitioner also seeks review of the District Court's denial of his Motion for Judgment as a Matter of Law, which was determined to be procedurally barred under Rule 50 of the Federal Rules of Civil Procedure, and his Motion for a Mistrial, which was denied as untimely.

Petitioner's Motion for Mistrial was premised on his contention that there was inadequate African-American representation in the jury pool. This motion was made after the jury was sworn. Furthermore, Petitioner failed to provide any supporting evidence that the jury's composition did not fairly represent a cross-section of the Hawaii community.

Finally, Petitioner seeks to have overturned the jury's verdict upon the claim that no evidence was presented to support the verdict and asserts the District Court's failure to grant a new trial was an abuse of its discretion.

Petitioner's attempt to solicit this Court's review by reciting adverse rulings on evidentiary and procedural matters falls well short of the "compelling reasons" set forth in Rule 10 of the *Rules of the Supreme Court of the United States* required for the exercise of this Court's jurisdiction.

Petitioner contests the Ninth Circuit decision in which both the Majority and Dissent affirmed the evidentiary and procedural rulings of the Hawaii District Court. Petitioner's continued disagreement with the Ninth Circuit's application of law does not warrant the Court's attention and the petition for certiorari should be denied.

## STATEMENT OF FACTS

On September 20, 2000, the Royal Hawaiian Band held auditions for a permanent, full-time, solo bassoon player. Three individuals auditioned for the position: Christopher Ventura, Ryan Howe, and Plaintiff Matthew Harrell. The selection process had two components, a live audition and an interview. During the audition phase, each applicant played the same assigned piece of music. During the interview phase each applicant was asked the same set of questions. A selection panel composed of Respondents Aaron Mahi, the Band Master of the Royal Hawaiian Band, Sanford Masada, the Assistant Conductor, and Robert Larm, the Woodwind Section Supervisor, graded each applicant for the audition and the interview.

Thereafter, the applicants were ranked by their overall score. Of the three applicants, Petitioner Harrell was ranked last by the selection panel. Although Harrell's performance was deemed satisfactory in some respects, it was also significantly flawed. He missed a number of notes and his sound was off with air leakage, pitch wavering, and a lack of endurance. Harrell was also noticeably nervous, and appeared to be suffering from performance anxiety. Furthermore, unlike the other two performers, his music failed to exhibit the sort of "beaming" or "brightness" quality expected of a soloist.

The bassoonist position was offered to Christopher Ventura, the applicant with the highest overall score. When he declined the position, it was offered to Ryan Howe, the next highest ranked applicant, but he also declined the position. After the first two applicants declined, the Royal Hawaiian Band made no further offers and the position remained vacant.

Petitioner filed claims of discrimination and retaliation against the City and County of Honolulu, Mahi, Masada and Larm. On January 12, 2006, after a six (6) day trial, a jury found in favor of the City and the named Defendants.

Thereafter, Petitioner appealed to the Ninth Circuit. In a 2-1 opinion, the Court affirmed the rulings of the District Court and the jury's decision. Both the Majority and the Dissent affirmed the lower court's rulings on evidentiary and procedural matters and its denial of Petitioner's motion for judgment as a matter of law. In addition, the Majority found the

record contained ample evidence to support the jury's verdict. Consequently, it ruled that the jury's verdict was not against the weight of evidence and determined that the decision was not a seriously erroneous result. The Majority therefore concluded that it was not an abuse of discretion to deny the Petitioner's motion for a new trial. By contrast, the Dissent opined the jury verdict was not supported by the evidence and in fact stated that the record contained "no evidence" to sustain it. Therefore, the Dissent was of the opinion that the district court abused its discretion in denying the Petitioner's motion for a new trial.

## REASONS FOR DENYING THE PETITION

### A. There Was No Abuse of Discretion in the District Court's Evidentiary Rulings

#### (1) Motion in Limine No. 4

The City sought to exclude all testimony or evidence which pre-dated the Named Defendants' participation in the Administration of the Royal Hawaiian Band for reasons of relevance, confusion or misleading the jury and hearsay. The Petitioner sought to introduce a magazine article and a book which pre-dated the Administration of the Named Defendants. The District Court excluded the magazine article, and all but one page of the book. On appeal, the Ninth Circuit ruled the Petitioner failed to show the excluded material was relevant, and further, that nothing in the Petitioner's Brief or the

record suggested the excluded material had " . . . any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable that it would be without the evidence." Since the Petitioner had failed to show an abuse of discretion which resulted in a prejudicial error, the ruling of the lower court must stand. *E.E.O.C. v. Pape Lifts, Ins.*, 115 F.3d 676, 680 (9th Cir. 1997); *Heyne v. Caruso*, 69 F.3d 1475, 2478 (9th Cir. 1995).

**(2) Motion in Limine No. 8**

Petitioner challenges his preclusion from offering the testimony of two expert witnesses who were not properly disclosed as required by the District Court's Rule 16 Scheduling Order. Petitioner failed to designate the proposed witnesses as experts, failed to give their qualifications and failed to state the substance of their opinions. The Ninth Circuit found Petitioner had failed to follow court orders, and failed to comply with the expert disclosure requirements of F.R.C.P. 26. Therefore, it was not an abuse of discretion to preclude the testimony.

**(3) Motion in Limine No. 9**

Petitioner challenges the preclusion of hearsay statements contained in the complaints he filed with the Hawaii Civil Rights Commission and the Equal Employment Opportunity Commission. Petitioner sought admission of these documents as business and

public records under their respective exceptions to the hearsay rule. However, Petitioner failed to explain how these exceptions applied. Therefore, the court found no abuse of discretion.

### B. There Was No Error in the Denial of the Motion for Mistrial

Petitioner moved for mistrial on the issue of the jury's composition, complaining that it contained no African-Americans. However, the motion was made after *voir dire* had been conducted, peremptory challenges had been exercised, the jury had been sworn and the venire excused. The District Court ruled the motion was untimely and the Ninth Circuit agreed. This ruling comports with established law. *Dias v. Sky Chefs, Inc.*, 948 F.2d 532, 534 (9th Cir. 1991); *Morning v. Zapata Protein (USA), Inc.*, 128 F.3d 213, 216 (4th Cir. 1997).

The Petitioner's challenge to the composition of the jury was initially reviewed by the District Court on constitutional grounds under the Sixth Amendment and pursuant to the test under *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 668 (1979). Although African-Americans are a "distinctive" group in the community, Petitioner failed to meet the remaining two prongs of the *Duren* test which required him to prove: (1) that the representation of African-Americans in venires from which juries are selected was not fair and reasonable in relation to the number of such persons in the community; and (2) that this

underrepresentation was due to a systematic exclusion of African-Americans in the jury-selection process. Petitioner offered no proof of the last two requirements and the motion was denied. Both the Majority and Dissent in the Appeals Court agreed with this disposition.

Petitioner also raised the issue of exemption of military personnel from the jury selection process. Pursuant to 28 U.S.C. § 1863(b)(6), full-time active military personnel are excluded from jury service. This occupational class is exempted from jury duty due to the need for uninterrupted performance and this exclusion has been determined to be reasonable and critical for the welfare of the community. *Taylor v. Louisiana*, 419 U.S. 522, 534, 95 S.Ct. 692, 700 (1975); *Rawlins v. Georgia*, 201 U.S. 638, 640, 26 S.Ct. 560, 561 (1906); *Gov't of the Canal Zone v. Scott*, 502 F.2d 566, 568-569 (5th Cir. 1974).

The Ninth Circuit agreed with the lower court decision that the motion was untimely, without merit and that there was no abuse of discretion. *United States v. Allen*, 341 F.3d 870, 891 (9th Cir. 2003).

### C. There Was No Error in Procedurally Barring the Petitioner's Untimely Request for a Motion for Judgment as a Matter of Law

Rule 50 of the Federal Rules of Civil Procedure requires that a motion for judgment as a matter of law be made at the conclusion of the evidence and before submission of the case to the jury. *See Janes v.*

*Wal-Mart Stores, Inc.*, 279 F.3d 883, 886-887 (9th Cir. 2002) (holding that if no motion is made at the conclusion of the evidence and before submission to the jury, the movant has failed to meet the "procedural prerequisite" for a post-trial Rule 50 motion). Even if not timely raised, however, and a plain error has occurred such that the failure to review would mean a "manifest miscarriage of justice", the matter may be reviewed by the court to determine if "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party". F.R.C.P. 50(a)(1); *Herrington v. County of Sonoma*, 834 F.2d 1488, 1500 (9th Cir. 1988). Nevertheless, if there is an evidentiary basis for the jury's verdict, their decision stands. *Grant v. City of Long Beach*, 315 F.3d 1081, 1085 (9th Cir. 2002).

The District Court determined that a F.R.C.P. 50 motion had not been timely filed, and therefore, the Petitioner was precluded from consideration of a motion for judgment as a matter of law. The Ninth Circuit Majority and Dissent agreed with the lower court.

### D. There Was No Error in the Denial of Petitioner's Motion for New Trial

Petitioner contends the decision not to offer him a band position was subjective, biased and racially motivated. Petitioner challenges the denial of his motion for new trial, contending that the evidence was insufficient to support the jury's verdict.

Neither the District Court, nor the Appeals Court may order a new trial if the record contains evidence to support a jury's verdict. *Alford v. Haner,* 446 F.3d 935, 936 (9th Cir. 2006), citing, *Graves v. City of Coeur D'Alene*, 339 F.3d 828, 839 (9th Cir. 2003); *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1372 (9th Cir. 1987). The standard of review is one of abuse of discretion. When the motion is based on the insufficiency of the evidence, it is considered a "strict standard". *Venegas v. Wagner*, 831 F.2d 1514, 1519 (9th Cir. 1987). Even where a Court might have come to a result different from the jury, if evidence exists in the record to support the verdict, it must stand and the motion for new trial must be denied. *E.E.O.C. v. Pape Lift, Ins.*, 115 F.3d at 680.

An adequate evidentiary basis exists in the record here to support the jury's verdict. The jury heard the evidence, observed the testimony of both Petitioner and Respondents, listened to the audition performance tapes of the three applicants, and considered the expert testimony submitted by both Petitioner and Respondents.

There was substantial testimony that the Petitioner's audition performance was flawed in numerous respects and that Petitioner was the least qualified among the applicants. Specifically, Petitioner missed a number of notes and his sound was noticeably off with air leakage, pitch wavering, and a lack of endurance. The panelists also testified that, unlike the other auditioners, Petitioner was noticeably nervous and that his tone failed to exhibit the sort

of "brightness" or "beaming" quality one would expect of a soloist. Finally, both experts agreed that the candidates had been ranked appropriately, that Petitioner exhibited nervousness and that his performance was flawed. Consequently, the jury's determination, after weighing the evidence, that Respondents did not engage in unlawful discrimination cannot be deemed "seriously erroneous". *E.E.O.C. v. Pape Lift, Ins.*, 115 F.3d at 680.

The Dissent at the Court of Appeals cited *Norris v. City and County of San Francisco*, 900 F.2d 1326, 1330 (9th Cir. 1990) as authority for its position that, once qualified, it is inconsistent and a pretext to reject an applicant as not being qualified if the "employer's explanation is unworthy of credence." 283 Fed.Appx. 509, 514 (Rawlinson, J., dissenting). Because it was "convinced that the employer's claim that Harrell was unqualified [was] not supported by the record", the Dissent opined that "the record d[id] not support the jury's finding of no discrimination." *Ibid.* Therefore, the Dissent stated there was an abuse of discretion in the denial of the motion for new trial. *Id.*

The standard set forth in *Norris* is more rigorous than portrayed by the Dissent, and *Norris* itself is easily distinguishable from the instant case. *Norris* involved a situation in which an applicant for a cable

splicer position[1] took a test for it, was deemed qualified and ranked third in a list of applicants and was subsequently denied the third position on three different occasions. The employer's purported justifications changed over time, included acquired-after data and directly conflicted with its practice in a contemporaneous promotion. *Norris* at 1330-31. Nevertheless, the Court ruled that the District Court needed to establish findings in a "sufficiently clear and explicit" manner to address whether the "employers' asserted rationale[s] . . . were so implausible as to be unworthy of credence" and remanded the case to the district court. *Norris* at 1329, 1330, *respectively*.

Unlike *Norris*, a lower scoring applicant was not selected over Petitioner and the rationale offered for his nonselection was neither implausible nor unworthy of credence. Petitioner's own witnesses concurred in the rankings made and the flawed nature of his performance. The jury also heard testimony concerning the expectations and responsibilities of a soloist and were repeatedly told about Petitioner's performance anxiety problems. Furthermore, they learned of a badly flawed solo performance by the Petitioner while previously playing part-time with the Royal Hawaii Band. Conjecture as to why the jury reached its decision only serves to underscore the fact that

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[1] Respondent would note the selection process for a Solo Bassoonist involves factors of musicianship which are more subjective in nature than the cable splicer position in *Norris*.

there was evidence to support the verdict. Only if there was *no evidence* may consideration be given to overturning the denial of the motion for new trial. Clearly, that is not the case here.

## CONCLUSION

None of the issues raised by the Petitioner meet the considerations governing review on certiorari set forth in Rule 10, of the *Rules of the Supreme Court of the United States* for the exercise of this Court's jurisdiction. Nothing in this Appeal raises any issues of conflict with decisions of other United States Courts of Appeal. The decisions and rulings of the lower court are consistent with well-established existing law, civil rules of procedure and evidentiary rules. Therefore, this Court should deny the Petition for Writ of Certiorari.

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